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**Supreme Court of the United States**

**OCTOBER TERM, 1953**

**No. 19**

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**THEATRE ENTERPRISES, INC., PETITIONER,**

**vs.**

**PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S  
INCORPORATED, RKO RADIO PICTURES, INC.,  
ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED MARCH 9, 1953**

**CERTIORARI GRANTED MAY 25, 1953**



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OCTOBER TERM, 1953

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IN THE  
**United States Court of Appeals**  
**FOR THE FOURTH CIRCUIT**

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No. 6512

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**Theatre Enterprises, Inc.,**  
**Appellant**

**V.**

**Paramount Film Distributing Corp.,**  
**Loew's Incorporated,**  
**RKO Radio Pictures, Inc.,**  
**Twentieth Century-Fox Film Corporation,**  
**Universal Film Exchanges, Inc.,**  
**United Artists Corporation,**  
**Warner Bros. Pictures Distributing Corp.,**  
**Warner Bros. Circuit Management Corp.,**  
**Columbia Pictures Corporation**

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**TRANSCRIPT OF TESTIMONY**

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**FILED**

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OCT 28 1952

CLAUDE M. DEAN



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**TRANSCRIPT OF TESTIMONY.**

[27] **MR. RAFTERY:**—May it please the Court and Members of the Jury, I think it would be very helpful if we considered the amusement business in general, so that we get a clear idea of run and clearance. This case is going to develop into a very simple case. It is a run and clearance case. That is all it is.

Mr. Myerberg says the downtown theaters in Baltimore, most of them independent theaters, by the way, have first-run pictures, and they are shown downtown ahead of the neighborhood.

In his deposition he says, "I would like to put into Baltimore a new system of distribution. I would like to see the picture field established first run. I would like to see the same picture played out in my neighborhood on Reisterstown Road with first run. I would like to see Mr. Durkee, if he was allowed to have the same picture at Catonsville, the Boulevard, the Senator, and then at the Edmondson Village"—in other words, instead of having run and clearance, "I would like to have an exclusive run in my neighborhood"; and he described his neighborhood in the deposition as being as far north as Reisterstown; then over to the east as far as Roland Avenue, and then to Catonsville, and south as far as Park Circle.

In that area, he says "I want an exclusive run [28] and I want 28 days clearance over the Uptown, the Pimlico, the Avalon, the Ambassador, the theater in Catonsville, and the new theater in Reisterstown." That is his idea of the new manner of distribution, that he wants to put into Baltimore, and thus change the entire manner and method that has been in existence in this state, and most of the states in the United States, for years and years.

. . . . .

HARRY MYERBERG SWORN: . . .

[44] Q. (By Mr. ROME):—As of 1948 through to 1950, Mr. Myerberg, what theaters in the city of Baltimore were exhibiting pictures on first run?

A. The Century.

Q. How large a house is that?

A. I would say about 3,000 seats.

Q. Do you know who is the exhibitor or who owns and operates the Century Theater?

A. Yes; I do.

Q. Who is the exhibitor?

A. Loew's Incorporated.

Q. What other first-run theater is there in the city of Baltimore?

A. Keith's.

Q. Who is the exhibitor there?

A. Mr. Schanberger.

Q. How large a theater is that?

A. I would say between 22 and 24 hundred seats.

Q. And another theater?

A. The New Theater.

[45] Q. The exhibitor there?

A. Mr. Mechanic.

Q. What is its seating capacity?

A. Somewhere around 1300.

Q. Another theater?

A. The Town.

Q. Who is the exhibitor that runs that theater?

A. Mr. Rappaport.

Q. Its seating capacity?

A. Around 1500.

Q. Is there any other first-run theater?

A. Yes; the Hippodrome.

Q. Who is the exhibitor there?

A. Mr. Rappaport, also.

Q. What is the seating capacity of the Hippodrome?

A. I would say between 1800 and 2000 seats.



Q. Any other first-run theater?

A. The Stanley.

Q. Who is the exhibitor that operates that theater?

A. Warner Bros.

Q. What is its seating capacity?

A. As I recall, somewhere around 3200 seats.

Q. Is there any other first-run theater?

A. Yes, sir; there is the Mayfair.

Q. Who is the exhibitor there?

[46] A. That was owned by the Hicks interests.

Q. What is its seating capacity?

A. I think it is under 800 seats.

Q. Is there any other first-run theater?

A. There is the Valencia.

Q. Who is the exhibitor?

A. Loew's Incorporated.

Q. And its seating capacity?

A. Somewhere around between 16 and 18 hundred, I think. I am not sure.

Q. You have described these theaters as being first-run theaters in the city of Baltimore during the period 1948 to 1950. Were they also the first-run theaters in the city of Baltimore for a number of years prior to that time?

A. Yes, with the possible exception of the Town Theater, which was the old Palace Theater rebuilt under the name of Town Theater, in 1949.

Q. Taking up the theaters by turn, Mr. Myerberg, what product has been exhibited at the Century Theater during this period 1948 to 1950?

A. Loew's, Metro Pictures, some Universal, and some United Artists.

Q. Has it exhibited the product of any other distributor company?

[47] A. No.

Q. Has that been true also for the years prior to the period of 1948?

A. Yes, with the exception of—I don't think, in years

prior, that they played Universal pictures. They played United Artists and Metro pictures.

Q. For how long, to your knowledge, has the Century Theater played Metro's and United Artists'?

A. At least 20 years.

Q. What about the Valencia?

A. The Valencia plays the move-over from the Century Theater, of the same product. Sometimes they play what we term a "slough" or a second-grade picture?

Q. What is meant by a move-over picture?

A. A picture which has no clearance and moves directly on its final day from one theater, and opens the very next day in the next theater.

Q. For how long a period of time has the Valencia played that product, that type of product, to your knowledge?

A. For many years, and particularly, periodically, the Valencia has been closed.

Q. What product plays in the Stanley Theater?

A. Warner Bros. pictures and half of Paramount.

Q. For how long has that theater exhibited that product, to your knowledge?

[48] A. For quite a long time; but there was pooling arrangements there with Loew's Theaters.

MR. RAFTERY:—I move to strike out the pooling arrangements.

THE COURT:—Why?

MR. RAFTERY:—He has no knowledge of that, and there is no such. We are dealing with the period 1948 to 1950, and nothing of that character was in existence at any time during that period.

THE COURT:—Are you speaking from your own knowledge?

THE WITNESS:—Yes.

THE COURT:—I will allow the answer. He claims he knows.

THE WITNESS:—It was generally known in the busi-

ness at that time, and from 1930 or '31. to '36, I was with Warner Bros., and I knew the pooling arrangement between Loew's and Warner Bros. at the Century and Stanley Theaters.

MR. RAFTERY:—I move to strike out, as having no connection with an alleged conspiracy. We are dealing with the period from 1948 to 1950, and he is testifying to mere hearsay, in 1930 to 1936.

THE COURT:—I don't know that it is hearsay. I will allow it.

THE WITNESS:—There was a pooling arrangement between—

Q. (By MR. RAFTERY):—Just a minute. What product has been playing at the Hippodrome Theater?

A. RKO and Columbia.

Q. For how long a period of time has the product been playing in that theater, to your knowledge?

A. For at least 20 years.

Q. What about the Town Theater?

A. The Town Theater opened in 1949. It did not get any new product. It split the product that was playing in the Hippodrome Theater. Mr. Rappaport split it between the two theaters and played the same companies, RKO and Columbia, they split between the Town and Hippodrome.

Q. And that product has been playing in the Town Theater since it opened?

A. Yes, to my knowledge.

Q. What product plays in the New Theater?

A. Twentieth Century Fox.

Q. For what period of time, to your knowledge, has Twentieth Century Fox played in the New Theater?

A. I would say, better than 20 years.

Q. What about the Keith's Theater—what product does it play?

A. It plays Universal; that is, part of Universal and half of Paramount, and whatever else it can pick up.



[50] Q. For what period of time, to your knowledge, has Keith played those products?

A. Quite a long time. I would say, the same period of time—20 years.

Q. You have also mentioned Mayfair Theater. What product does it play?

A. The only company that I know, that the Mayfair has, is Republic, an independent company, and it plays the same type of "slough" picture, that the Valencia plays when it plays not on a move-over policy, but plays a direct first-run picture.

Q. For what period of time had that theater exhibited that type of picture, to your knowledge?

A. I think, since they opened. That was early in the 1940's.

Q. Has there ever been a time, in the city of Baltimore, to your knowledge, Mr. Myerberg, in which first run product has played in any other locality outside of the so-called downtown area?

A. Yes, sir.

Q. When was that and what theater was that?

A. That was the Metropolitan Theater, located at North Avenue and Pennsylvania.

Q. How far away is that from the downtown center of the city?

[51] A. I don't know the exact distance, but I would say  $2\frac{1}{2}$  miles.

Q. What product played first run in that theater?

A. Warner Bros.

Q. When was that?

A. I would say, in the middle or late 20's.

Q. Who was the exhibitor or operator of the Metropolitan Theater at that time?

A. Warner Bros.

Q. When was it, Mr. Myerberg, that you first got the idea about the erection of the theater that became known as the Crest Theater?

A. In the latter part of '46 or the early part of '47.

Q. What happened at that time?

A. We had purchased a particular tract located at Reisterstown Road and Rogers Avenue, more than a half of which was zoned commercially. We proceeded to build homes on that portion that was zoned residential, and after completing the homes,—we bought the property originally with the idea of establishing a first-class commercial area in that section, and made numerous surveys of the area, and decided that that would be the hub of the entire area in that section of Baltimore.

MR. RAFFERTY:—I move to strike that out as a conclusion, and no statement of fact.

[52] THE COURT:—I will allow it.

Q. (By MR. ROME):—Excuse me. You have used the word "we". Whom do you mean by that?

A. You see, I am in business with my brothers, and if I use the word "we" it actually means that I did it, because we always speak of things collectively. When one of my brothers or myself does something, "we" do it collectively although I may have done it, or one of them may have done it. In this case, I meant my brothers and myself.

Q. How large a tract did you purchase?

A. I don't recall the exact size now. I think, between 12 and 15 acres.

Q. What portion of it was devoted to the construction of homes?

A. I would say, about 40 or 50 per cent of it.

Q. How many homes did you build in that area?

A. I would say, between 50 and 65.

Q. Were they all sold?

A. They were sold before they were completed.

Q. Following the erection of the houses and their sale, what did you do with regard to the development of that area?

A. After a survey was made, we decided that this was

the spot for the commercial area, commercial center. We built what we considered a very fine commercial center and [53] had it planned, we had assigned that portion of the area to accommodate a theater.

Q. You have referred here to surveys. What surveys did you make, Mr. Myerberg?

A. We made population surveys within a certain radius of the theater, and made surveys as to the expansion of the city, and we believed the city was expanding from the center at a greater speed and was taking in population in that area, although it was not as great as in other sections, it was still formidable, and we had a large interest in building operations, residential building operations.

Q. What was the amount of the population that you found to be in that area—I withdraw the question.

Mr. Myerberg, what do you have in mind when you speak of the area of the Crest Theater?

A. We feel the area of the Crest Theater draws from south to Park Circle, and west to approximately Gwynns Falls Parkway, and in the same line east to Roland Avenue, taking that in a line north through Liberty Road to the west, and east through the Green Spring Valley up into Reisterstown.

Q. What is the amount of population you found to be in that area, that you have just described?

A. I could not locate the exact survey made at that time. However, we reconstructed it from the same information that we received at that time, and found from the 1950 [54] Census of the Health Department of the City of Baltimore, in that area in 1950, that there was approximately 125,000 people.

[55] Q. What was the source of the statistics you relied upon in reaching that figure?

A. The maps and the information from the Health Department of Baltimore figure, the census figure.

Q. Have you ever at any time testified to a different figure for the population of that area?



A. Yes, I have. During the examination of the defendants.

Q. By the defendants?

A. By the defendants, the question was asked what I thought the population was, and I said around 175,000. I told them then that I did not have the opportunity to look over my records and that was my guess at that particular time. I happened to have been wrong. However, the reconstruction of the population was based on the same method that we used in 1947 to 1950 survey.

Q. So that actually how many people had you found as a result of your investigation to be in that area that you have described as of the period 1947, 1948, Mr. Myerberg?

A. In that area, we found that the population increase was approximately 10,000, as close as we could determine, not an exact figure, from 1947 to 1950.

Q. So that at that time it was something less than 125,000?

A. I would say within 105,000; we will take 20,000 off.

[56] Q. When was it that you actually constructed the stores and shops constituting the shopping center that has been referred to?

A. 1947.

Q. That was before the construction of the theatre?

A. Yes, sir.

Q. And when was it that you were prepared to carry through your idea for the construction of the theatre itself?

A. We had planned the theatre in 1947 and then begun construction of it in the early part of 1948.

Q. At what time did you first get in touch with the distributors with regard to product for your theatre?

A. I would say it was in January of 1948.

Q. When is that time with relation to the actual construction of the theatre?

A. That was before the construction of the theatre.

Q. Before ground had been broken? —

A. Yes, sir.

Q. What did you then do in January of 1948?

A. I visited Washington and I saw each of the major distributors over there, the big eight, and told them that we had plans and were about to begin the construction of this theatre, and each one of them told me that they could not discuss—I asked them at that time and told them what we [57] wanted, that we were going to build the type of theatre that would require first-run pictures, it would be of such size and appointments that we would need first-run for the economic life of the theatre, and uniformly each one told me that they could not discuss it. It was a national policy of theirs, their home office was in New York, they were not to discuss the film for that theatre until the theatre was built, to come back after the theatre was near completion and they would consider film for the theatre.

Q. You have said that you saw the big eight of the companies. Whom do you specifically mean that you saw at that time in January, 1948?

A. Warner Brothers, Paramount, Loew's Incorporated, Metro, Loew's Incorporated distributes Metro pictures. Universal, RKO, United Artists, Columbia, and I don't know whether I said Paramount or not.

Q. You did mention Paramount. You mentioned Warner's, Paramount, Loew's, Universal, RKO, United Artists and Columbia. That's seven companies. The other was Fox, was it not?

A. Fox, that is correct.

Q. Following these conversations in January of 1948 what did you then do, Mr. Myerberg?

A. We proceeded with the construction of the theatre.

Q. When next did you get in touch with the distributors?

A. Sometime in the latter part of September, the first [58] of October, 1948.

Q. And where was it that you got in touch with them?

A. I went to Washington to see them.

Q. Washington is the exchange area that serves Baltimore, is it?

A. Yes, sir.

Q. And whom did you go to see first in that connection, if you remember?

A. I went to see Mr. Bob Smeltzer first. I had known Mr. Smeltzer for quite a long time and knew he was probably in seniority the oldest person and probably one of the most capable in the film industry in Washington, and I wanted to talk to him first.

Q. What was his position?

A. Mr. Smeltzer told me—

Q. What was his position with what company?

A. He was with Warner Brothers.

Q. What was his official capacity with Warner Brothers, if you remember?

A. He was District Manager.

Q. What conversation, if any, did you have with Mr. Smeltzer?

A. I told Mr. Smeltzer of the theatre, but he seemed to know of it. He did know of it. I had talked to him earlier in the year and he knew of the theatre, and he had [59] followed the construction of it either himself or through the men in his office, and he said: "You can't expect any first-run pictures from Warner Brothers because we have our own theatre in Baltimore. It is our policy throughout the country to play our pictures in our own theatres, in first-run situations, and it is our understanding that that is permitted to us by the courts." He said, "However, I cannot see why any company that does not have a theatre in Baltimore would not like the opportunity of selling to your theatre."

Q. Did you have any other conversation with him at that time?

A. We probably had some other talk of other things



as well as the theatre and the business in Baltimore and Washington, and then I left Mr. Smeltzer.

**Q.** Was there any arrangement or indication that you were to get in touch with him in any way?

**A.** Well, he said that New York passes on these things, he couldn't pass on it, to write him a letter, that he thought he could get word from New York, although he thought he knew what it was going to be.

**MR. ROME:**—Would you please mark this carbon copy of a letter dated October 12, 1948 addressed to Warner's Film Inc., 901 New Jersey Avenue, N.W., Washington, D. C., attention Mr. Robert Smeltzer from Mr. Harry Myerberg, president?

**[60] THE CLERK:**—Plaintiff's exhibit No. 1.

(Letter dated October 12, 1948 from Harry Myerberg to Robert Smeltzer was marked Plaintiff's exhibit No. 1.)

**Q. (By MR. ROME):**—I hand you, Mr. Myerberg, a document which has been marked for identification as plaintiff's exhibit No. 1 and ask you if you can tell the Court and jury what that document is?

**A.** This is a letter that I sent to Mr. Smeltzer after my visit in October to him requesting first-run pictures in the City of Baltimore.

**MR. ROME:**—Will you mark this letter dated October 14, 1948 on the letterhead of Warner Brothers Pictures Distributing Corporation, from Robert Smeltzer to Harry Myerberg as the next exhibit, please?

**THE CLERK:**—That will be plaintiff's exhibit No. 2.

(Letter dated October 14, 1948, Smeltzer to Myerberg, was marked Plaintiff's exhibit No. 2.)

**Q. (By MR. ROME):**—I hand you a document which has been marked plaintiff's exhibit No. 2 and ask you if you will describe to the Court and jury what that is?

**A.** This is a letter from Mr. Smeltzer. When I was in his office I asked if it would be possible for the opening of the Crest Theatre not only to get us a first-run picture from his company, but to try to arrange to get some movie



stars there to enhance the opening. This letter was to tell [61] me that it would be impossible to get movie star and also to tell me that he thought he had made his position quite clear that we could not get Warner Brothers pictures first-run in Baltimore.

MR. ROME:—If the Court please, I offer these two documents in evidence.

THE COURT:—Do you want to read them?

MR. ROME:—Not at this moment, sir.

MR. RAFTERY:—I think they ought to be read.

MR. ROME:—If you would prefer, sir, I would be happy to read them.

This, members of the jury, is a letter signed by Mr. Myerberg, addressed to Warner's Film Company, attention Mr. Robert Smeltzer and it reads:

"Gentlemen:

"On October 5, 1948, I had an occasion to talk to you at your office and explain in considerable detail about the new theatre with which I am connected. So that you may have all this information readily accessible for both yourself and for the other officials of your company, I am taking this opportunity to formally present all the facts.

"It is expected that on November 15, 1948, this theatre, located at 5521-29 Reistertown Road, Baltimore, Maryland will be completed and ready to exhibit motion pictures. Advantageously located from a population and transportation [62] viewpoint, the theatre has all the conveniences necessary to insure first-run motion picture success.

"This theatre can truly be said to be the most modern and exquisite in Baltimore. Its architectural design and interior decoration, quality of equipment, and comforts to patrons, make it a unique and different theatre for this area. Having approximately sixteen hundred luxurious seats on the first floor, in addition to superb private accommodations for another hundred in the loges, this

theatre undoubtedly offers the finest showcase for films in the State of Maryland.

"Free to patrons of the theatre is a specially built parking area, accommodating about 400 cars. In addition, there is ample space available on uncrowded streets directly adjacent to the theatre for the parking of automobiles.

"This magnificent motion picture theatre, designed and planned to exhibit first-run pictures in Baltimore, presents itself to your company as an outlet for your highest quality first-run product. To open the theatre, the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion—is required. The splendor of the theatre must be complemented by the quality of a top-notch production. [63] A world premiere is desirable.

"Plans are being formulated to make the opening of the theatre one of the greatest affairs of this year in the industry. Radio and television broadcasts and personal appearances of all political, local and society leaders are to be arranged.

"It is hoped that your company can furnish the final element to complete what promises to be one of the most important and exciting premieres in the history of the motion picture industry in Baltimore—personal appearances of some of your leading actors and actresses. As you so well know, the glamour these Hollywood personalities add can provide the final touch necessary to crown the brilliant opening of the newest first-run film outlet in this area.

"I am at the present time in a position to tender my bid herewith for your first-run pictures Baltimore, which will be available for exhibition at this theatre. I am prepared to offer you any reasonable guarantee against a

percentage of the gross. I can further offer the highest type of exploitation and management, both of which will at all times be under the supervision of the most experienced theatrical people, and which will insure your company greater returns than you have heretofore enjoyed in this area. I am in a highly favorable position to offer these advantageous terms because this theatre's fixed charges are relatively [64] negligible in comparison with those expenses which must be met by other first-run theatres in this city. The maximum playing time for your pictures shown in this theatre is assured because our policy is to thoroughly exhaust each picture's potentialities without indiscriminate 'pulling' to make room for any accumulated backlog of other company's pictures waiting to be exhibited before your pictures have completed their proper run.

"I agree to set a minimum gross figure that would control the completion of each picture's engagement. This policy will guarantee you the fullest playing time possible in Baltimore and will substantially increase your prior earnings for similar showings in this area.

"It would be greatly appreciated if this matter would be given your prompt attention so that the final plans necessary for the grand opening can be formulated.

"With kindest personal regards, I am,

"Very truly yours,

"(Sgd) Harry Myerberg, President."

Plaintiff's exhibit No. 2, members of the jury, is a letter signed "Robert Smeltzer," on the stationery of Warner Brothers Pictures Distributing Corporation, 901 New Jersey Avenue, Northwest, Washington 1, D. C. and dated October 14, 1948, which reads:

"Dear Harry:

[65] "Enjoyed our chat when you were in the office last week, and the contents of your letter of October 12



regarding personal appearances of Stars for the opening of your Hilltop Theatre, will be taken up with the proper executives and you advised accordingly, however, I thought I thoroughly explained to you regarding Warner Products in our own Stanley Theatre, Baltimore, Md., which I thought at the time was quite explicit.

"Kindest personal regards,

"Sincerely yours,

"(Signed) Robert Smeltzer."

Q. (By Mr. Rome):—Mr. Myerberg, the name of the theatre in this communication is referred to as the "Hilltop Theatre."

A. Yes, sir.

Q. Can you describe what happened with regard to the name?

A. We had anticipated calling the theatre the "Hilltop Theatre" but found that Don Swann's theatre was in existence as a summer theatre, and we did not want to have any confusion, so we changed the name to the "Crest Theatre." It is the same.

Q. Who else did you get in touch with in Washington in October, 1948, Mr. Myerberg?

A. We went to Metro.

Q. Whom did you see at the Metro office?

A. I saw Mr. Adams, the branch manager.

[66] Q. What happened when you saw him?

MR. RAFTERY:—Well, if you please, fix the time and place.

MR. ROME:—I thought it had already been fixed, Mr. Raftery, as October, 1948.

MR. RAFTERY:—I thought it fixed it with dates in the other one.

Q. (By Mr. Rome):—Do you recall the specific or approximate date of your visit?

A. No, sir, I think it was in the early part of October, 1948. I don't recall the exact date of the visit.

Q. What happened when you saw people at Metro?

A. Mr. Adams told me almost the identical thing that Mr. Smeltzer had told me.

MR. RAFTERY:—I object to that and move he tell us what Mr. Adams said, and not what was almost identical.

THE COURT:—I suppose the witness is trying to save time, which we all ought to try to do. But if you want the exact words, if you remember them, Mr. Myerberg, go ahead.

THE WITNESS:—Yes, sir. Mr. Adams said that Loew's Incorporated owned two first-run theatres in the City of Baltimore and that it was their understanding from their legal department that they could play their own pictures in their own theatre and did not have to submit them to competitive bidding or competitive negotiations in other theatres. [67] Therefore, he could not offer me first-run pictures in the City of Baltimore. However, those decisions were made in New York and for me to kindly write him a letter and then he would in turn take that letter up with his New York office and get their answer in the matter.

Q. (By Mr. Rome):—Was there any other conversation with Mr. Adams at that time?

A. At this time I don't recall any others.

Q. Did you write such a letter to Metro, Mr. Myerberg?

A. Yes, sir, I wrote a letter to Mr. Adams.

MR. ROME:—Will you kindly mark this letter dated October 12, 1948 from Harry Myerberg to Metro-Goldwyn-Mayer Corporation, as the next exhibit number?

THE CLERK:—That will be plaintiff's exhibit No. 3.

(Letter dated October 12, 1948, Myerberg to Metro-Goldwyn-Mayer, was marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Rome):—Mr. Myerberg, I hand you a letter which has been marked plaintiff's exhibit No. 3 and ask you if you can identify that?

A. Yes, sir, that is the letter I sent to Mr. Adams.

**MR. ROME:**—Mark this, please, letter dated October 15, 1948 on the stationery of Metro-Goldwyn-Mayer Pictures, Loew's Incorporated, 1009 New Jersey Avenue, Northwest, Washington 1, D. C., from J. A. Adams, Resident Manager to Mr. Harry Myerberg.

[68] **THE CLERK:**—That will be marked plaintiff's exhibit No. 4.

(Letter dated October 15, 1948, Adams to Myerberg, was marked Plaintiff's Exhibit No. 4.)

**Q. (By Mr. Rome):**—I hand you plaintiff's exhibit No. 4 and ask you if you can identify that?

**A.** This is an answer from Mr. Adams notifying me that he had received the letter and would at a future date communicate with me and furnish us with the information he got.

**MR. ROME:**—Your Honor, I offer plaintiff's exhibits 3 and 4 in evidence, and have discussed with counsel on the other side the fact that we need not read exhibit 3, sir, since it is the same kind of a letter which Mr. Myerberg sent to Warner Brothers which has been marked plaintiffs exhibit 1.

**THE COURT:**—Well, if it is in evidence the jury can read it if you do not want to read it all.

**MR. RAFTERY:**—Your Honor, it is the identical letter which was read about the world premiere, and so forth, written on the same day that letter was written to Warner Brothers. In other words, Metro got the same request in the same language that Warner Brothers got.

**THE COURT:**—I shouldn't think you need read it, then. Do you want to read the answer?

**MR. ROME:**—I thought Mr. Myerberg had already read it. [69] This is dated October 15, 1948 on the letterhead of Loew's Incorporated and it is from J. A. Adams to Mr. Harry Myerberg, and it reads: "Your letter of October 12, 1948 addressed to this office, with reference to the new theatre located at 3521-29 Reisters-town Road, Baltimore, Maryland, has been received.



"The matter is being investigated and upon receipt of the necessary information, we will communicate with you again. Very truly yours, J. A. Adams, Resident Manager."

[71] If the Court please, I should like to offer in evidence as plaintiff's exhibit No. 5 a letter from Loew's Incorporated, signed by J. A. Adams, Resident Manager, under date of October 19, 1948, addressed to Mr. A. M. Eisenberg, New York City. Mr. Eisenberg is a member of the legal department of Loew's Incorporated.

(Letter dated October 19, 1948, Adams to Eisenberg, was marked Plaintiff's exhibit No. 5.)

MR. ROME:—If the Court please, I would like permission to read this letter to the jury.

"Dear Mr. Eisenberg:

"We are attaching a copy of a request and our reply thereto for a first-run in the City of Baltimore, Maryland, made [72] by Mr. Harry Myerberg of the newly constructed theatre on Reisterstown Road, temporarily called the 'Hilltop Theatre'.

"We are also attaching a freehand drawing of the area showing the proximity of this house to other established houses in the area. Obviously we cannot entertain this proposal, but it is suggested and recommended that in the event we are able to place our product here on other than a first-run basis, it be set up to play a first subsequent run on an equal basis with the Uptown, Ambassador and Forest Theatres.

"Awaiting your advice in the matter, and with kindest regards,

"Sincerely, J. A. Adams, Resident Manager."

And there is marked down in the corner, members of the jury, carbon copies being sent to Mr. Berger, Mr. Allen and Mr. Hirsch.

Q. (By MR. ROME):—Mr. Myerberg, before we ad-

journed for lunch, you were testifying concerning your conversation in October of 1948 with Mr. Adams as a result of which you sent the letters that have already been referred to. Now, did you have any conversations at or about that same time with any other company?

A. Yes, sir.

Q. Did you have conversations with RKO?

A. Yes, sir.

Q. Whom did you see in RKO?

[73] A. Mr. Brecheen, the branch manager.

Q. When was this?

A. About the same time, in October.

Q. 1948?

A. Yes, sir.

Q. What conversation did you have with Mr. Brecheen at that time?

A. I saw Mr. Brecheen and recalled our conversation that we wanted first-run pictures in the Crest Theatre we are now nearing completion. It was necessary, however, to have first-run pictures in there. We wanted first-run pictures from his company for our theatre. Mr. Brecheen tried to discourage me and he said he could not possibly see how I could get first-run pictures there since RKO has a national policy which had not permitted first-run pictures except with a few exceptions, to any theatre located outside of a downtown area of a city, that they had a very satisfactory customer over here in the Hippodrome Theatre, in Mr. Rappaport, and as far as he was concerned he had no intention of changing. However, if I wanted him to, he could refer the matter to New York, which he had to do for final authority on it, that if I would write a letter outlining what I wanted to do, he would forward it to New York.

Q. Was there any other conversation with him at that time?

[74] A. At the same time I asked him the same thing I asked the other branch managers I had seen.

Q. What, specifically, Mr. Meyerberg?

A. To the effect that we wanted a first-run picture to open the theatre, and we would like to get some motion picture stars there to enhance the opening, and that I was willing—at that time “Joan of Arc” was just being readied for release, and I think I asked Mr. Brecheen about that, and it is my recollection that Mr. Brecheen said that no selling policy had been furnished for the picture as yet. Therefore, he could not talk about it. And that is all I remember at this time about the conversation.

Q. Following that conversation with Mr. Brecheen, did you write such a letter to RKO?

A. Yes, sir, I wrote a similar letter to RKO that I wrote to the other companies.

MR. RAFTERY:—The witness has referred to this world premiere letter of October 14, 1948, and it has been suggested that some stipulation be made so as to not burden the record with these letters. I am willing to stipulate. I think other counsel are willing to stipulate that a letter identical in form to the letter that the jury have over there now, that is, the October 12th letter about a world premiere, was sent to RKO by Mr. Myerberg on October 14, 1948, the only difference in the letters being the first two that were introduced [75] in evidence were dated October 12, 1948, and this letter, the photostat of which I have, was dated October 14th, and we will save burdening the jury with another reading of the same world premiere letter.

THE COURT:—Very well.

MR. ROME:—If it please the Court, I should like to offer in evidence as plaintiff's exhibit No. 6 a letter under date of October 15, 1948 on the stationery of RKO Radio Pictures, Inc., 203 Eye Street, Northwest, Washington 1, D. C., signed by J. B. Brecheen, Branch Manager, addressed to Mr. William Zimmerman, and I think that we may stipulate Mr. Zimmerman is General Counsel and Assistant Sales Manager.



*Harry D. Myerberg, Direct.*

MR. RAFTERY:—No. He is assistant to Mr. Depinet or Mr. Mochrie, the General Sales Manager. He is also a lawyer, but he is in the distribution end of the business.

MR. ROME:—He is the gentleman to whom this letter was sent. Subject "Hilltop Theatre, Baltimore, Maryland."

"Dear Bill:

"Theatre Enterprises, Inc., of Baltimore, Maryland, headed by Harry Myerberg, will soon be ready to open their 'Hilltop Theatre' located at 5521-29 Reisterstown Road, Baltimore, Maryland.

"This is a neighborhood location one and two-tenths miles from the Uptown Theatre, Baltimore. Mr. Myerberg made an appointment with me Monday of this week to discuss product, [76] and I expected him to ask for first neighborhood run either day and date with the Uptown Theatre or perhaps against the Uptown Theatre, instead he wanted first-run Baltimore, Maryland. I did everything to discourage such an idea because we have in our first-run account in Baltimore one of the finest, most cooperative accounts I have ever seen and whom in the course of a year pays us a lot of film rental. I then went to Baltimore to make a survey of this theatre. No doubt but what it will be a very beautiful house when completed, approximately 45 to 60 days from now. I think that it will compare very favorably with I. M. Rappaport's New Town Theatre in Baltimore. Of course it is a suburban house. Mr. Myerberg, upon returning to Baltimore, wrote me a letter, and I have acknowledged receipt of it. This file is herewith enclosed and is self-explanatory.

"It, therefore, will be necessary for you to instruct me what to do about it. I certainly do not want competitive bidding in this situation because I do not believe a neighborhood theatre can compare with a downtown house in a city the size of Baltimore.

"Form B is also hereto attached.

"Sincerely yours, J. B. Brecheen, Branch Manager."

[79] Q. (By MR. ROME):—Did you get in touch with any other distributor company at that time, Mr. Myerberg?

A. Yes, sir.

Q. What other company?

A. Twentieth Century Fox.

Q. When was this?

A. About the same time, in October.

Q. Whom did you see at Fox?

A. I saw Mr. Norris.

Q. Who is Mr. Norris?

A. Mr. Norris then was the branch manager of the Washintgon Office of 20th Century Fox.

Q. What conversation did you have with him?

A. I said to Mr. Norris, or spoke to Mr. Norris about our wanting the availability of first-run pictures made available to the Crest Theater; that we were going to open. Mr. Norris told me that he knew, of course, of the theater, and he was, as I recall it now, in a meeting with, a meeting I called him out of, with his New York executives, or executives from out of town; that he would take it up and write them a letter, telling them what I wanted; that this thing probably could not be done, but to write him a letter and he would take it up. It was a very short conversation with Mr. Norris at that time, but I had more meetings after that.

[80] Q. Did he say with whom it would be taken up?

A. He said, with the New York office. I don't recall anything more than that, at this time.

Q. Pursuant to that conversation, you then wrote a letter similar to those that already have been referred to here, to Fox?

A. Yes.

MR. RAFTERY:—Now, what is the date of that letter, so that we can make the same stipulation?

MR. ROME:—October 12.

MR. RAFTERY:—We stipulate that on October 12th, the same date as the Metro and Warner Bros. letters, a

similar World Premier letter, the identical World Premier letter, was sent to Mr. Norris, of 20th Century Fox Film.

Q. (By Mr. Rome):—Did you have any conversation with anyone at the Paramount Corporation?

A. Yes, sir; I saw Mr. Benson at Paramount. He was the branch manager of Paramount.

Q. What conversation did you have with him? First, when was that conversation with Mr. Benson?

A. Within the same period of time, the early part of October, '48, and I reminded Mr. Benson of my earlier request, that the theater was now completed and we required pictures, and we wanted them either on an exclusive basis in the city of Baltimore, or on a day and date basis with [81] downtown. He said it was his company's policy throughout the country to exhibit pictures in the downtown areas of the cities, and not in suburban houses. I called his attention to the Kansas City situation, I knew about that, and he said that was an exception which he could not understand.

I also called to his attention the fact that they were doing at that time, at that particular time in Washington, between the Warner and Ambassador Theaters, the same thing, and he said that was something there, an exhibitor owned both theaters, the exhibitor being Warner Bros., and because of that, he thought it was the policy for many years, and his only reason to refuse that was that we could not do it in Baltimore. I said, "Is this final?" And he said, "We will refer this to New York. They make final decisions on these matters, and you, like the others, send me a letter, and I will forward the letter." And I wrote the same letter requesting, or setting forth the theater, setting forth the fact of the World Premier, as I did in the other case.

MR. RAFTERY:—We will stipulate that on October 14th the same letter was written by Harry Myerberg, President, to Paramount Pictures, Inc., Attention of Mr. Benson, the same World Premier letter.



Q. (By MR. ROME):—Did you see anyone at Universal?

A. Yes, sir; I saw the then branch manager, Mr. Martin.

[82] Q. When was this, Mr. Myerberg?

A. About the same time I had been in Washington; I had been in Washington for several days, seeing people.

Q. And you had a conversation with Mr. Martin?

A. Yes. The conversation went along the line of the other conversations I have related; and Mr. Martin told me specifically or substantially what the other branch managers had told me.

MR. RAFTERY:—If Your Honor please, I think we ought to know what Mr. Martin is supposed to have said. Unfortunately, Mr. Martin has died since this conversation, and instead of saying "substantially," I think, in fairness to us, we should get his best recollection of the conversation that took place.

THE COURT:—Do you remember it more specifically?

THE WITNESS:—I saw Mr. Martin, as I recall, the Baltimore salesman was with him, and I went into this matter of the opening of the theater, in my conversation with him, the early part of that year, pertaining to the new theater I was going to open, which turned out to be the Crest Theater, instead of the Hill Top Theater, and Mr. Martin told me that it was Universal's policy throughout the country to exhibit pictures in downtown areas of cities, and that they would not distribute them in suburban areas; and I talked to Mr. Martin about that, and he said, "Well, [83] I can't make any decision on this thing. It has to be referred to someone higher than me, and I have to take it up with New York." And I suggested I would go to New York; and he said, "You send me a letter, and I will forward it to New York." He said that would start it—which I did, and I sent him the same letter I sent to the other distributors, a letter setting forth the type of theater it was, so that the New York people,

who had not seen the theater, and the letter was primarily fitted for that purpose, so that the people in New York, whom he had to refer this to, and who had not seen the theater, might at least have a word picture of what we were putting there, and the run that we were requesting, and what we wanted to do.

Q. And you sent such a letter?

A. Yes.

MR. RAFTERY:—We will stipulate that on October 14th, 1948, he sent the same World Premier letter to Universal, International Film Corporation, care of Mr. H. Martin.

MR. ROME:—I call upon you, Mr. Raftery, for a copy of the letter from Mr. Martin to Mr. Fred Myers, dated October 20, 1948.

MR. RAFTERY:—Here is the letter.

MR. ROME:—I should like to offer in evidence as Plaintiff's Exhibit 7, a letter from Mr. H. J. Martin, Branch Manager of the Universal Company, addressed to Mr. [84] Fred Myers, Home Office, with carbon copies marked for Messrs. J. J. Scully, A. J. O'Keefe, W. A. Scully, and E. T. Gomersall, this letter being dated October 20, 1948:

"Dear Mr. Myers:

"I am attaching hereto copy of letter received from Mr. Harry Myerberg requesting product first run Baltimore for a theater at present under construction and temporarily referred to as the Hill Top Theatre.

"I have seen this theatre and it is all that the gentleman claims from the standpoint of appointments, capacity, et cetera. It is located eight miles from downtown Baltimore and a mile and a half from the Uptown Theatre. Your suggestions as to procedure are solicited.

"Very truly yours,

H. J. Martin Branch Manager."

There is attached a copy of the letter from Mr. Myerberg to Universal, which has already been referred to.

(Letter dated October 20, 1948, from H. J. Martin, Branch Manager of Universal, to Mr. Fred Myers, marked Plaintiff's Exhibit 7.)

Q. (By MR. ROSE):—Who is Mr. Fred Myers, Mr. Myerberg?

A. At that time, I think he was the Eastern Divisional Manager for Universal Pictures.

Q. Having to do with sales and licensing?

A. And distribution; yes.

[85] Q. Did you have a conversation with anyone in United Artists?

A. Yes, sir.

Q. This was also—

A. This was the second conversation I had with each of these exchanges. The first was around January, and this was the first part of October. I saw Mr. Price, of United Artists, and with him, I think, were Mr. Rose, the Baltimore salesman, was also in the room at the time. It was either Mr. Rose or Mr. Young, which, I don't recall, who was the salesman at that time, they change them so quickly and frequently—and I told Mr. Price, I recall that conversation during the early part of the year, and told him that we were now under roof, finished the theater, and we needed pictures, and wanted them as first run Baltimore. He told me that all the pictures that his company had for release at that time had been sold out through January first; that he had nothing to offer.

I said, "Does that mean that as to those that you release after January 1st, you will offer pictures to me?" He said, "No; that doesn't." He said, at the present time, he is going to offer—they have nothing to offer. And we went into the same information, just practically the same thing, to write him a letter and he would take it up with New York. And I sent Mr. Price the same letter



that I sent to the other distributors, [86] again setting forth the same things.

MR. RAFTERY:—I will stipulate that on October 12, 1948, the same World Premier letter was addressed by Mr. Myerberg, President, to United Artists, Attention of Mr. J. Price.

Q. (By MR. ROME):—Mr. Meyerberg, did you ever get any reply from United Artists?

A. No, sir.

Q. Did you ever have any further correspondence of any kind with United Artists?

A. I made numerous phone calls from that time, on, up to just before the opening of the theater, and immediately thereafter I was in Washington, and I sent telegrams and didn't even get the courtesy of a reply to them.

[90] Q. (By MR. ROME):—In any event, you got no reply of any kind from United Artists?

A. No, sir.

Q. Did you have any conversations with Columbia?

A. I have no recollection of the Columbia meeting, with Columbia at all, and I have no recollection of sending them a letter. I did, earlier in the year, but not in October. Was that the particular time—I don't recall talking to Columbia.

Q. Did you get in touch with Columbia at any time thereafter?

A. Yes; at a later date, I got in touch with Columbia, and offered substantial bids on several pictures which apparently were not even acknowledged, to my recollection.

Q. Were you ever able to license for your Crest Theater pictures for first-run exhibition in the city of Baltimore, either on an exclusive basis or a day-and-date basis, from United Artists?

A. No, sir.

Q. Were you ever able to license such pictures from Columbia?

A. No, sir.

Q. Were you ever able to license such pictures from [91] any company that is a defendant in this case?

A. No, sir, I haven't.

Q. Were you ever able to see any executive other than those persons in the Washington office of United Artists?

A. Yes; Mr. Fred Meyers, the Eastern Divisional Manager of Universal, visited my theatre just before it opened.

Q. Do you recall when that was?

A. That was in either November or December, sometime, around that time, 1948, and he stated that he could not grant our theatre either a day-and-date policy with downtown or an exclusive first-run in the city of Baltimore, as it was their policy throughout the country to show their pictures in the downtown areas, first-run.

I reminded, as I recall at that time, Mr. Meyers, that the picture "Hamlet" was being released, and my theatre was very suitable for showing that picture, and that I would like to offer a bid for "Hamlet" to play our theatre as first-run in the city of Baltimore. Mr. Meyers said he would consider it. And that was the extent of the conversation with Mr. Meyers.

I think, as I recall now, that I wrote a letter to Mr. Meyers the day after his visit, recalling his visit and asking him for a decision on the matters we discussed.

Q. Mr. Myerberg, I hand you a letter dated December [92] 15, 1948, and ask if you can identify that?

A. That is a letter I sent to Mr. Martin, of Universal Pictures.

Mr. Rome:—If the Court please, I offer it in evidence as Plaintiff's Exhibit 9. It is a letter from Mr. Myerberg, dated December 15, 1948, to Universal, Attention Mr. H. Martin:

"Gentlemen:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run,

*Harry D. Myerberg, Direct.*

City of Baltimore either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

[93] "Very truly Yours,

"THEATRE ENTERPRISES, INC.

"By: Harry D. Myerberg."

(Copy of letter dated December 15, 1948; from Harry D. Myerberg to Universal-International Film Corp., was marked Plaintiff's Exhibit No. 9.)

Q. (Mr. Rome):—I hand you two letters, dated December 31, 1948, and one dated January 6, 1949, and ask if can identify those?

A. A letter I wrote to Mr. Meyers after his visit to the theatre, and his answer to me.

Mr. Rome:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 40, two letters clipped together—a letter dated December 31, 1948, on the stationery of Universal Film Exchanges Inc. to Mr. Harry D. Myerberg:

"Dear Mr. Myerberg:

"With reference to your letter of December 15th addressed to Mr. H. J. Martin at our Washington office.

"I note your statement—'accepting our offer-permitting (you) the right to bid on (our) pictures first neighborhood run.'



"So that the record may be straight, this is to advise you that we never made any offers to you whatsoever of the nature referred to by you.

[94] "Kind regards.

"Sincerely,

"(Sgd) Fred Meyers."

Then there is a copy of a letter, dated January 6, 1949, from Mr. Myerberg to Mr. Fred Meyers:

"Dear Mr. Meyers:

"It was my understanding that during your visit to our Crest Theatre in company with your Mr. Scully and Mr. Martin, you refused us the right to competitively bid for your pictures first run, City of Baltimore, either on exclusive or day and date basis. At that time it was also my understanding that you granted us the right to bid on your pictures first neighborhood run in this area.

"It is apparent from your letter of December 31 that my understanding with regard to first neighborhood run pictures is not correct. If the above is a fact, what run are you prepared to offer our Crest Theatre. We have tried continually, through numerous letters, telegrams and phone calls, since October 12, 1948 to have your company set forth the run you will grant our Crest Theatre.

"It is imperative that we receive word from you immediately as further delay in negotiating for films would cause us great financial loss.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: (Sgd) Harry D. Myerberg."

[95] (Letter dated December 31, 1948, from Universal Film Exchanges Inc. to Harry D. Myerberg, and copy of letter dated January 6, 1949, from Harry D. Myerberg, to Mr. Fred Meyers, were marked Plaintiff's Exhibit No. 10.)

MR. ROME:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 11, a letter on the stationery of Universal Film Exchanges Inc., Washington Office, dated January 18, 1949, addressed to Mr. Myerberg, signed "H. J. Martin, Branch Manager."

"Dear Mr. Myerberg:

"In reply to your letter of December 15th, be advised that it is our intention to offer you the opportunity to negotiate for our pictures for use in the Crest Theatre, and to be available at the same time as they are to other first neighborhood runs.

"At such time as our next picture is made available to the neighborhood runs, we will have our Sales Representative call upon you for the purpose of negotiating such sale.

"Universally yours,

"(Sgd) H. J. MARTIN

"Branch Manager"

(Letter dated January 18, 1949, from H. J. Martin, Universal Film Exchanges Inc., to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 11.)

[96] Q. (By MR. ROME):—So that ultimately you licensed pictures from Universal on a first neighborhood availability, is that correct, Mr. Myerberg?

A. Yes, sir.

Q. Have you ever seen any other executive of any other company, with the exception of those people assigned to the Washington offices?

A. Yes, I saw Mr. Moon, who to my knowledge then was Eastern Division Manager of Twentieth Century-Fox Film Distributing Company.

Q. Do you recall when it was that you saw Mr. Moon?

A. To the best of my recollection, in November or December of that year, 1948.

Q. What happened on that occasion?

A. I had been asking Mr. Norris for the right to go to New York to see some of his executives and personally talk to them about the situation, and was not getting any answer from him as to what I could do; and at that time Mr. Contee, who was the sales manager of the Washington Branch, called me and said Mr. Moon would be in town, and whether I would talk to him; and I told him I would be very happy to talk to him. And Mr. Moon came to my office with Mr. Contee and Mr. Norris. Mr. Norris was the branch manager. Mr. Contee was the sales manager at that time, and we again renewed the discussion of the first-run pictures, [97] either on a day and date basis or an exclusive basis, in the city of Baltimore, for the Crest Theatre. Mr. Moon told me flatly, it was against his company's policy to do it, and he would not do it; that they don't do it except in a few locations, where they own their own theatres in the country, and that he would not do it here in Baltimore; that he had a satisfactory customer in Mr. Mechanic at the New Theatre, and he would not permit us to play those pictures.

I asked Mr. Moon, as I recall, whether that also held true for a day and date policy with the New Theatre, would he permit the Crest Theatre to play the pictures day and date with the New Theatre. He said he would take that under advisement and let me know at a later date.

I invited Mr. Moon to see the theatre, being he was in town, and none of the top executives of Fox who were making the visit had seen the theatre, and I told him I would be very happy to take them out and show them the theatre, and its location, and so forth. He said he had several appointments, that he could not go at that time. I think it was sometime in the morning when he was there, as I recall it, but that he would see it later in the day, and would certainly see it before he left Baltimore.

I asked Mr. Moon, when he left his last appointment,



to please call me and I would make myself available, [98] regardless of the time, to show him the theatre. I did not hear from Mr. Moon, as I recall, up to the latter part of the afternoon, and I went to the Crest Theatre to see if he had gone there without me. The Theatre was not open yet, and whether he had just gone out, and I asked the watchman if anyone had been it it, or asked for me, or came to see the theatre, and he said "No." And I stayed there for quite a long time, and left, and came back at 10 or 11 o'clock that night, and no one had seen the theatre. So I don't think Mr. Moon saw the theatre.

Q. Mr. Myerberg, I hand you a letter dated November 8, 1948, and ask if you can identify what that is?

A. A letter I wrote to Mr. Moon, immediately after his visiting my office, requesting information on the decision of his company.

• Mr. Rome:—If the Court please, I offer in evidence as Plaintiff's Exhibit 12, a letter on the stationery of Theatre Enterprises, dated November 8, 1948, addressed to Mr. Moon, of the Twentieth Century-Fox Company:

"Dear Mr. Moon:

"I was delighted to have the opportunity of speaking with you and your Mr. Contee and Mr. Norris on November 4, 1948 in my office and have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948.

[99] "It is my understanding that you, on behalf of 20th Century Fox, have taken the position that our Crest Theatre, 5425-27 Reisterstown Road, Baltimore, Maryland cannot have the opportunity to competitively and openly bid for pictures first run Baltimore City.

"However, there are several matters which were discussed which are in need of clarification.

"Has your company refused our Crest Theatre the right to open a competitive bidding for your product on a day and date run with first run Baltimore?

"Am I right in understanding that your company would permit our Crest Theatre to bid only on your pictures first subsequent run Baltimore?

"We have delayed the opening of the Crest Theatre until December 27, 1948.

"It is imperative that your company's position in the above matters be clarified immediately so that pictures can be obtained for the theatre. Any delay in negotiating pictures would cause us great financial loss since it would be necessary to postpone the opening of the Crest.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By:

"(SGD) Harry D. Myerberg."

[100] (Copy of letter dated November 8, 1948, from Harry D. Myerberg to Mr. Moon, of Twentieth Century-Fox, was marked Plaintiff's Exhibit No. 12.)

Q. (By Mr. ROME):—Who is Mr. Andrew Smith?

A. At that time he was the general sales manager of Twentieth Century-Fox in New York.

Q. And Mr. Norris was what?

A. The Washington Branch Manager.

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 13, a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 9, 1948, Office of R. E. Moon, Eastern Sales Manager, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter, dated November 8th.

"Our company's position with regard to first run City of Baltimore is as follows:

"We have a satisfactory customer operating what we consider the best first run outlet in the City of Baltimore and it is our intention to continue to serve our pictures first run to the New Theatre.

"You are correct in your understanding that we would permit your Crest Theatre to negotiate competitively with the Senator Theatre for first subsequent run in Baltimore.

"Very truly yours,

"(Sgd) R. E. Moon."

[101]- (Letter dated November 9, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 13.)

Q. (By Mr. Rome):—Mr. Myerberg, I hand you a copy of a letter dated November 11, 1948, and ask you if you can identify that, first?

A. This is my reply in answer to Mr. Moon's letter of November 9th.

Mr. Rome:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 14, copy of a letter dated November 11, 1948, addressed to Mr. R. E. Moon, Eastern Sales Manager, 20th Century Fox Film Co.

"Dear Mr. Moon:

"Your letter of November 9, 1948 received and contents noted.

"You make your Company's position clear in so far as you will not permit our Crest Theatre to competitively bid on exclusive first run pictures in the City of Baltimore. However, the following needs clarification:

"Does this refusal also include our request for a day and date run with first run City of Baltimore as noted in my registered letter of November 8, 1948?

"In your last paragraph you mentioned the Senator Theatre. I have never requested information regarding this theatre. Will you kindly clarify what is meant by [102] this?

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: (Sgd) Harry D. Myerberg."

(Copy of letter dated November 11, 1948, from Harry D. Myerberg to R. E. Moon, was marked Plaintiff's Exhibit No. 14.)



**MR. ROME:**—If the Court please, I offer as Plaintiff's Exhibit 15 a letter on the stationery of Twentieth Century-Fox Corporation, Office of R. E. Moon, Eastern Sales Manager, addressed to Harry D. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter of November 11th, and I will try to give you the requested clarification.

"First, we do not wish to play the Crest Theatre day and date with first run City of Baltimore.

"Second, regarding the Senator Theatre, this theatre is located in your competitive area and is currently playing our product first run in this area. If you desire to play pictures in that position, you would naturally have to compete with the Senator for the run.

"Very truly yours,

"(Sgd) R. E. Moon."

(Letter dated November 12, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 15.)

[103] **Q. (By Mr. Rome):**—Mr. Myerberg, where is the Senator Theatre in relation to your own theatre?

**A.** It is on York Road and Belvedere Avenue, about 6½ miles from our theatre.

**Q.** At any time have you considered the Senator Theatre to be in a competitive situation with the Crest Theatre?

**A.** No, sir.

**Q.** At any time did you make any request of Fox Film Company, or any company, regarding the Senator Theatre?

**A.** No, sir.

**Q.** What kind of product were you finally able to license from Twentieth Century-Fox, Mr. Myerberg?

**A.** The first subsequent run, that is, second-run pictures, 21 days after downtown.

Q. Have you ever seen or talked with any other executive of any other company, apart from those you have mentioned, other than the personnel attached to the Washington office?

A. I had correspondence with Mr. Lichtman, of Twentieth Century-Fox, but I have never seen or talked to him.

Q. Who is Mr. Lichtman?

A. Mr. Lichtman was just then appointed as assistant to the president, Mr. Skouras, of Twentieth Century-Fox.

Q. What led you to get in touch with him?

[104] A. I read in a trade magazine that Mr. Lichtman was reported in a speech, by the trade papers, before a group of exhibitors in Philadelphia, in company with Mr. Andy Smith, who was the general sales manager, and with Mr. Einfeld, the newly-appointed general publicity director of Twentieth Century-Fox, this exact same idea. It was not mine. I had nothing to do with the authorship of it, the multiple first runs in cities. He set forth the facts—

\* \* \* \* \*

[106] MR. ROME:—I offer, as Plaintiff's Exhibit 16, the Film Bulletin dated April 11, 1949, on page 7 of which there appears a story under the caption, "FOX MEETINGS FORECAST CHANGES IN OLD PATTERNS", and there appears this report under the subheading "Multiple First Runs":

"Lichtman expounded on the theory of multiple first-runs and elimination of excessive clearance first advanced by him in the Philadelphia meeting with exhibitors. Instances where pictures played simultaneous first runs in non-conncting areas has proven a 'boon to the box office,' he said.

"Urging that this plan be explored, he argued that the public, the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs.

"We launch a picture with a large expenditure of money for advertising, and we tell the public that they can only see

it in one theatre. They have to come great distances at great inconvenience to transportation and other matters.

[107] "Ad Value Lost.

"After the run in that one theatre, we place the picture in moth balls for a considerable period of time, before that picture reaches the fine theatres in the residential sections of these large cities. By that time the advertising is forgotten and other pictures are being announced with the result that we are losing a great portion of the patronage which of course means a great many dollars to all of."

"Under the plan, Lichtman added, all subsequent run theatres would be moved up with the result that a much larger theatre audience is developed 'because people see pictures when they want to see them.'"

("Film Bulletin" dated April 11, 1949, was marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Rome) Did the report of the speech of Mr. Lichtman, just referred to, appear elsewhere in the trade press than in the Film Bulletin?

A. Yes, sir; it did.

Q. Mr. Myerberg, I hand you a copy of a letter dated April 13, 1949, and ask if you can identify what that is?

A. That is a letter I sent to Mr. Lichtman, after reading the statement reported in the last document referred to.

MR. ROME:—I offer in evidence letter dated April [108] 13, 1949, from Harry D. Myerberg, to Mr. Al Lichtman, Vice President, Twentieth Century-Fox Film Corp.

"Dear Mr. Lichtman:—

"After reading your statement in the MOTION PICTURE HERALD of April 2, 1949, made at a meeting with exhibitors in Philadelphia and noting your complete accordance with our request to play your company's pictures simultaneously with first run, City of Baltimore, I wish at this time to review the case of our new Crest Theatre, located at Reister-town Road and Rogers Avenue, in Baltimore, Maryland.

"It is evident from your statement that you have not been consulted in your company's unjustifiable refusal to grant our Crest Theatre this run. So that you may have



*Harry D. Myerberg, Direct.*

a complete picture of what transpired, I am enclosing copies of all correspondence between your company and Theatre Enterprises, Inc. and after reviewing this correspondence and satisfying yourself as to the outstanding quality and location of our Crest Theatre, I have no doubt that you will grant us the right to play your pictures simultaneously with downtown Baltimore.

"This theatre was built to accommodate simultaneous run policy with first run, City of Baltimore and therefore is suffering a great financial loss being forced by your company to run pictures 21 days after first run, City of Baltimore. [109] "Your immediate action in this matter will be greatly appreciated.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: (Sgd) Harry D. Myerberg"

(Copy of letter dated April 13, 1949, Harry D. Myerberg to Al Lichtman, was marked Plaintiff's Exhibit No. 17.)

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 18, a letter from Twentieth Century-Fox Film Corporation, on the stationery of Al Litchman, Vice President, dated April 25, 1949, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"I have just returned from my trip throughout the country. Among other things, I spoke with our Washington Manager.

"We discussed constructive plans for the improvement of conditions in the city of Baltimore for all concerned, and I am sure that in the near future, our Mr. Norris will discuss these plans with you.

"With kindest regards and thanking you for writing me, I am

"Sincerely,

"(Sgd) Al Lichtman"

(Letter dated April 25, 1949, Al Lichtman to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 18.)

Q. (By Mr. Rome) Mr. Myerberg, Mr. Lichtman's letter [110] refers to the fact that Mr. Norris would be in touch with you. Did you ever hear from Mr. Norris?

A. Not pertaining to my letter to Mr. Lichtman, no.

Q. Was anything ever done, to your knowledge, to better the situation in Baltimore, as referred to by Mr. Lichtman?

A. The only other thing that I know of was, I think, in the late spring or early fall of that year,—the theatre had been open 7 or 8 months by that time,—Mr. Contee, then the sales manager of Twentieth Century-Fox office in Washington, contacted me and wanted to know whether I would play any multiple first-run in Baltimore, first day and date with downtown, and that they were contemplating such a run.

I said, "Oh, yes, we would, that is the thing I wanted all along." And he said they were getting the information together; and I spoke to Mr. Contee on several occasions about it. In fact, I got in touch, about that time, with Mr. Contee—I don't know whether Mr. Norris was there, but the then manager for Fox came in and discussed the situation with me, and, as I recall, thinking of a certain number—the number I don't recall at this time—to start the policy.

[111] Well, after that meeting I never heard anything further from Mr. Contee, and when I inquired they told me New York had vetoed it and it was thrown out.

Q. What specifically was the policy that was being talked about at that time?

A. Playing multiple first-run day and date with downtown, and I think there was something else at that time, about getting in line with what Mr. Lichtman had said was the cutting of clearances.

Q. You mean by "multiple first-run," having a first-run picture exhibited in more than one theatre at the same time?

A. Yes, sir.

Q. Did there come a time when you communicated again with Mr. Lichtman?

A. Yes, I recall about a year later Mr. Lichtman took over the position of General Sales Manager of 20th Century

Fox, replacing Mr. Smith. I took the occasion to write him a letter reminding him of our letter of a year before.

Q. I hand you a copy of a letter dated May 24, 1951 and ask you if you can identify it?

A. This is a copy of a letter I sent to Mr. Lichtman at that time.

Mr. Rome:—If the Court please, I offer in evidence as plaintiff's exhibit No. 19 a copy of a letter dated May 24, [112] 1951, addressed to Mr. Lichtman.

"Dear Mr. Lichtman:—

"I note in the trade papers that you have become the General Sales Manager of Twentieth Century Fox Film Corporation. This fact brought to mind a letter I wrote to you on April 13, 1949, after reading in the Motion Picture Herald of April 2, 1949 a statement you had made at a meeting with exhibitors in Philadelphia, Pa. I am enclosing a copy of my letter and of your reply to it on April 25, 1949.

"Your statement at that time, as reported by the Motion Picture Herald, outlining methods whereby revenue could be increased for both distributors and exhibitors is even more pertinent to the situation in the industry today when we are confronted with the problem of television cutting deeply into grosses. I assume that you must still retain the opinions you expressed two years ago, and, therefore, I wish to invite your attention again to the situation in Baltimore.

"In your letter of April 25, 1949 you wrote as follows:

" 'We discussed constructive plans for the improvement of conditions in the City of Baltimore for all concerned, and I am sure that in the near future our Mr. Norris will discuss these plans with you.'

"Although more than two years have elapsed since you wrote to me I have received no information either from [113] you or Mr. Norris as to the plans you discussed and, I may add, there has been no improvement in conditions in Baltimore.

"Having in mind what you have said as well as the known fact that Fox as well as other distributors does exhibit its pictures in numerous cities throughout the country in



theatres located out of the so-called downtown area on a first run basis day and date with the downtown theatres, I cannot understand why a different course of action is followed in Baltimore.

"I would be glad to meet with you at your convenience to discuss this matter with you further.

"Yours very truly,

"THEATRE ENTERPRISES, INC.

"By Harry D. Myerberg."

(Copy of letter 5-24-51, Myerberg to Lichtman, marked Plaintiff's Exhibit No. 19.)

Q. (By Mr. Rome):—Did you receive a reply to that letter that you had sent to Mr. Lichtman?

A. No, sir.

Q. Did you have any acknowledgment of it at all?

A. No, sir.

Q. Reference is contained in that letter, Mr. Myerberg, to the effect that Fox in some situation in other areas of the country does pursue this policy of multiple runs. Do you, of your own knowledge, know of such situations?

A. Yes, sir, I know of some situations.

[114] Q. What situation do you know of?

A. I know of Los Angeles where Fox owns the theatres in which they have that policy. They play three or four theatres with a downtown theatre. I think they pursue it at Cincinnati, Ohio, Washington, D. C., but mostly in cases where they own the theatres themselves. I think Denver, Colorado, is another one, but I am not too sure of that.

Q. You mean, your statement is that Fox pursues this policy of a multiple first-run in areas or cities where it owns the theatre downtown as well as in the area outside of downtown?

A. Yes, and there are a few instances where they do not own the theatres and they pursue the policy also.

Q. Did you see any other executives or any other company with the exception of those persons normally assigned to the Washington branch offices?

A. I saw Mr. Zimmerman in New York.

Q. Do you recall when that was?

A. Well, that was the latter part of 1948, but I would say around November or December, sometime in there.

Q. How did that visit come about?

A. I continuously had asked Mr. Brecheen for some word as to the positions of their company and whether I could go to New York to see Mr. Jules Levy, who I think was either the Divisional Manager or General Sales Manager, I don't know [115] which. I think it was Eastern Manager, Mr. Jules Levy. And Mr. Brecheen kept stalling me and kept telling me he would get some information for me, and finally one time he told me to go to Mr. Zimmerman of RKO's legal department in New York.

I told him that I did not want to see attorneys, I wanted to see the sales personnel. I wanted to see Mr. Levy. He said: "Well, I don't understand. Mr. Zimmerman was not only a lawyer but he was also the General Sales Manager of the company and in seeing him, you will be seeing the sales personnel." He said that he would make the appointment, and he made the appointment, and I saw Mr. Zimmerman.

Q. What happened when you saw Mr. Zimmerman?

A. Mr. Zimmerman tried to persuade me from first-run policy in the City of Baltimore, telling me he did not do that anywhere in the country, that their general policy throughout the country was to play their pictures in large neighborhood theatres downtown, and he did not want to and did not see where they could deviate from that policy. I told Mr. Zimmerman that he had a fine picture coming up that would become available for national release at the same time to show at the Crest Theatre, and that picture, was "Joan of Arc," and I offered him a substantial guarantee on the picture. I don't recollect whether or not I offered him a substantial guarantee at that time, but I told him I would post a substantial guarantee on the picture to open my Crest Theatre if he would consider it, and he said: "Well, we haven't formulated a sales policy yet," but that he would contact me and let me know.

Q. Was there anything more to your conversation with him at that time?

A. Well, he said something to the effect: "You should go home now and be a good boy now and take 21-day pitcures," or something to that effect, I think that ended the conversation.

Q. I hand you, Mr. Myerberg, a copy of a letter dated November 23, 1948, and ask you if you can identify that?

A. Yes. This was the copy of the letter that I sent to Mr. Zimmerman after my meeting with him in New York, and it contains an offer that I made for "Joan of Arc."

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 20 a copy of a letter dated November 23, 1948 addressed to William Zimmerman, RKO Pictures, Inc.

"Dear Mr. Zimmerman:

"I was delighted to have had the opportunity of speaking with you at your office on November 18th, 1948 and to have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948."

"I would like at this time to confirm the oral bid which I made for your picture 'JOAN OF ARC' to play our Crest [117] Theatre, first run City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay 55% of the first \$8000 gross box office receipts and 65% of all over \$8000. We will also place any reasonable guarantee, the figure to be mutually agreed upon.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above.

"Again thanking you for your courtesies while visiting you in New York, I am,

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By Harry D. Myerberg"

(Letter dated November 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 20.)



*Harry D. Myerberg, Direct.*

**MR. ROMB:**—If the Court please, I offer in evidence as plaintiff's exhibit No. 21 a letter on the stationery of RKO Radio Pictures, Inc., Rockefeller Center, New York, dated December 2, 1948, signed William Zimmerman, addressed to Harry D. Myerberg, Theatre Enterprises, Inc., Baltimore.

"Dear Mr. Myerberg:

"You have suggested that I confirm in writing our decision communicated to you by telephone Monday, November 29th. You have requested that your Crest Theatre be permitted to exhibit our pictures first-run in Baltimore either [118] on an exclusive or day and date basis. In considering your request we have made a thorough review of the matter, including discussions with Mr. Folliard, our District Manager, and Mr. Brecheen, our Branch Manager. We have concluded that the Crest Theatre is essentially a neighborhood theatre and as such would not be appropriate outlet for the exhibition of our pictures first-run in the City of Baltimore.

"However, we are willing to afford you a competitive opportunity to obtain our pictures for exhibition in the Crest Theatre on first neighborhood run in its area. If you are interested in obtaining pictures on this run, will you kindly advise us to this effect.

"During our telephone conversation on Monday I advised you that we would further consider your specific offer of October 23rd to exhibit *JOAN OF ARC* first-run. After such further consideration we have decided that our conclusion that the Crest Theatre is not an appropriate theatre for the exhibition of our pictures first-run in the City of Baltimore applies with equal, if not greater, force to *JOAN OF ARC*. Accordingly, we regret to advise you that we cannot accept your proposal.

"Sincerely,

"(Signed) William Zimmerman."

(Letter dated December 2, 1948, Zimmerman to Myerberg, was marked Plaintiff's Exhibit No. 21.)

[119] Q. (By MR. ROME):—Mr. Myerberg, I hand you a copy of a letter dated December 23, 1948 and ask you if you can identify that?

A. Yes. This is in answer to the letter Mr. Zimmerman sent me.

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 22, copy of a letter dated December 23, 1948, addressed to Mr. William Zimmerman, RKO Radio Pictures, Inc.

"Dear Mr. Zimmerman:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run, City of Baltimore, either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time, accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the [120] information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: Harry D. Myerberg"

(Letter dated December 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 22.)

MR. ROME:—If the Court please, I offer in evidence as Plaintiff's exhibit No. 23, a copy of a letter on the stationery of RKO Radio Pictures, Inc., the Washington

*Harry D. Myerberg, Direct.*

office, dated October 3, 1948, to Mr. Wm. Zimmerman, New York, New York.

"Dear Bill:

"I wrote you under date of October 15 concerning the Hilltop Theatre, Baltimore which will soon be ready for opening under the management of Mr. Harry Myerberg.

"You will recall Mr. Myerberg is asking for first run Baltimore, and which I did not recommend personally.

"In the meantime, Mr. Myerberg has called me three times insisting on an answer to his letter. His latest request this week was that I make him appointment and let him go to New York and talk to our people there concerning this situation. I stalled him on this request, but did tell him I would write once more to see about getting an [121] answer to his correspondence.

"Will you, therefore, please advise me immediately just what can be done about this situation.

"With kindest regards, I am,

"Sincerely yours.

"J. B. Brecheen

"Branch Manager"

(Letter dated October 3, 1948, Brecheen to Zimmerman, was marked Plaintiff's exhibit No. 23.)

Mr. Rome:—That letter has a notation at the bottom "cc: R. J. Folliard."

If the Court please, I offer in evidence as Plaintiff's Exhibit No. 24 a copy of a letter on the stationery of RKO Pictures, Inc., again Washington, D. C., dated November 9, 1948, addressed to Mr. Wm. Zimmerman in New York, subject: Hilltop Theatre, Baltimore—Crest Theatre, Baltimore. The letter reads:

"Dear Bill:

"Under date of October 15 I sent you Form B, together with explanation of the Hilltop Theatre, Baltimore



having requested first run product for that theatre. On October 30 I wrote you again advising you of the numerous telephone calls we had received from Mr. Harry Myerberg concerning his request for product.

"In the meantime the name of the theatre will be [122] the Crest Theatre and not the Hilltop.

"Hereto attached is a letter dated November 8, which came to me via registered mail from Mr. Myerberg insisting on an answer to his correspondence and telephone calls. You will note that he has moved back the opening of his theatre to December 27, 1948.

"The time has come when we can no longer stall this matter with telephone calls. We are going to have to give him some kind of an answer. He wants to go to New York and see you or Mr. Levy and talk it over with you.

"Please advise immediately upon receipt of this letter just what you want me to do about it or just what you intend to do about it.

"Sincerely yours,

"J. B. Brecheen  
"Branch Manager"

(Letter dated November 9, 1948, Brecheen to Zimmerman, was marked Plaintiff's Exhibit No. 24.)

Q. (By Mr. Rome):—What kind of product were you ultimately able to license from RKO Radio Pictures, Mr. Myerberg?

A. First neighborhood run.

Q. And how long after downtown first-run exhibition of the picture in the City of Baltimore was that?

A. Well, it was supposed to have been 21 days.

[123] Q. You say "supposed to have been." What was it, in fact?

A. Well, quite frequently it was much longer than that.

Q. Did you ever see any other official of any one of the distributor companies with the exception of Mr. Zim-

merman, Mr. Meyers, Mr. Moon, Mr. Minsky you have named?

A. I saw Mr. Scully, who was Divisional Manager, but that was in the company of Mr. Meyers, and at the same time I saw Mr. Meyers. The conversation was with Mr. Meyers and not with Mr. Scully at that time.

Q. Did you see anyone else?

A. No, sir.

Q. Was there ever a time when any official from New York came to examine or see your theatre?

A. Only Mr. Meyers.

Q. He is the only official from any company who saw your theatre other than the Washington personnel?

A. At this time, yes.

Q. So that ultimately you were able to license product only on the first-run subsequent availability at the Crest Theatre; is that correct?

A. Yes, sir, from each company.

Q. When actually was the Crest Theatre opened?

A. February 26, 1949.

Q. Your letters that are in evidence have referred to [124] an earlier projected opening for the theatre. What happened to delay that?

A. There were delays in getting some of the material and equipment necessary to open the theatre, which delayed the opening.

Q. You finally opened the theatre on February 26, 1949?

A. Yes, sir.

Q. Now, will you describe for the jury, please, some of the features that are incorporated into the Crest Theatre?

A. Well, the Crest Theatre has many innovations, we feel, in the development of motion picture theatres. One of the important ones is what we term the first hidden projection booth whereby the noise and direct small beam light from the projection booth is not seen nor heard.

We have what we thought to be at that time the first television lounge with a television projection set, a set that projected a picture six by nine feet. That was in 1949 at the opening of the theatre. We had this in the lounge of the theatre, what we called the "television lounge," accessible by two stairways from the lobby and we could seat with additional chairs placed there when we needed them—and we needed them frequently—about 100 people.

We had loges located off of this same lounge that were placed there for persons who wished to smoke during the [125] performance and could use those if they so desired.

We had a parking area, free parking for our patrons. The decorative motif of the theatre was on a very high, artistic plane. In fact, in the front bay of the television lounge, overlooking the marquee of the theatre, being seen readily from the front, was one of the finest examples of carved glass in the country, made by the man who developed that method of art or idea of art, Mr. Lowry, of Washington.

The carpets, the restroom, the ladies' powder room, everything was set up on a basis to accommodate first-run pictures and to handle large crowds. Our standee area in the rear of the theatre is such that the Fire Department permitted us, although we have only 1600 seats, we originally expected to have close to 1800, but we reseated the house—I mean by reseating it we rearranged the seats, so you would have ample room in front of you so your knees would not hit the seat in front of you, and we staggered our seats, instead of looking over the head of a large person in front of you, you would look over their shoulders, having greater vision to the screen.

Q. What is the extent of the parking area, Mr. Myerberg?

A. We can park between 350 to 400 cars on our own lots. They are in the front of the theatre, the side of the



theatre, and the rear of the theatre, and we have reserved [126] another area which we have never paved because we felt we never needed it. We would have paved it immediately if we had gotten first-run pictures, or if we felt the need of it. That would hold an additional 150 cars. We felt we would have from 500 to 550 spaces, be able to park that number of cars on our own lots. And on the streets surrounding the theatre, which are not congested, cars can park as well.

Q. What was the total cost for the Crest Theatre?

A. The total cost without profit, the actual cost, was 460-some thousand dollars.

Q. I hand you a photograph, Mr. Myerberg, and ask you if you can identify this photograph, on both sides, please.

A. Yes, sir.

Q. What is the photograph?

A. This is the front of the Crest Theatre showing the marquee, the box office, and that carved glass that I spoke of before, above the marquee.

Q. And on the other side?

A. Shows a view of the auditorium looking from the stage to the standee area, shows a section of the television lounge with the television screen, and it shows the standee area, the area at the rear of the auditorium of the theatre.

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 25 the photograph so described of [127] the Crest Theatre.

(Photograph of Crest Theatre was marked Plaintiff's exhibit No. 25.)

Q. (By MR. ROME):—I hand you another photograph Mr. Myerberg, and ask you if you can identify that, on both sides, please.

A. Yes, sir. This side is the Crest Theatre and the Hilltop Shopping Center, the rest of the stores together with the Crest Theatre that makes up the shopping center.

Q. And what appears on the other side?

A. On the other side is a plot plan showing the different store locations and some of the parking area.

Mr. Rome:—If the Court please, I offer in evidence as plaintiff's exhibit No. 26 a photograph of the Hilltop Shopping Center and the Crest Theatre and a map or plan of the shopping center and theatre.

(Photograph of Crest Theatre and Hilltop Shopping Center was marked Plaintiff's exhibit No. 26.)

Q. (By Mr. Rome):—Mr. Myerberg, do you know when approximately these photographs were taken?

A. I think sometime during 1949. I don't remember the exact date, after the theatre had opened.

Q. Was there any recognition accorded the Crest Theatre by virtue of its qualifications as a theatre?

A. I think the recognition of every branch manager in [128] Washington of the different distributors, and there was one special recognition that we received. We received the International Award of the "Exhibitor Magazine" for being one of the most outstanding theatres constructed in the year of 1949 in Canada, the United States and South America. That plaque now hangs in the lobby of our theatre.

Q. What is the "Exhibitor Magazine"?

A. It is a trade paper.

[131] Q. (By Mr. Rome):—That Oscar Award was actually presented to your theatre by whom, Mr. Myerberg? Who was it who made the actual presentation?

A. The actual presentation was made on the television show that we were invited on because of the award, and the presentation was made by Gov. McKeldin.

Q. How many shops or stores are there in the Hilltop Shopping Center?

A. I would say there are about 15 or 16 tenants there.

Q. And do you know what the monthly rental is from those stores, tenants?

A. I would say it would be around \$5,000 a month. This does not include the theatre.

Q. Are all of the stores rented?

A. Yes, sir.

Q. Has there been any turnover in the tenancy of the stores?

[132] A. One store. There was a cleaning and dyeing store in there that after a year or so vacated the store. This store was re-rented, and there has been no vacancy since then.

Q. Has the shopping center been a successful venture?

A. Yes, sir.

Q. You have mentioned, Mr. Myerberg, that the cost of the theatre was approximately 460-odd thousand dollars; is that correct?

A. Yes, sir.

Q. How was that financed?

A. Through the first mortgage of approximately \$307,000. The balance between the \$307,000 and the cost of the theatre was made up by my brothers and myself personally or from companies we completely controlled.

Q. What is the Pem Construction Company which has been mentioned here?

A. That is a building company that builds homes, commercial buildings or any type of construction.

Q. That is the organization which actually constructed the Hilltop Shopping Center and the Crest Theatre?

A. Yes, sir.

Q. And when did Theatre Enterprises, Inc., become the owner of the Crest Theatre?

A. It was in 1951.

[133] Q. Prior to that time had it operated under a lease?

A. Yes, under a lease.

Q. What was the rental, if you know?

A. As I recall, the rental was \$600 a week, which was about \$30,000 a year, or thereabouts.



Q. When the Theatre Enterprises Company took over the actual ownership of the Crest Theatre from the Pem Construction Company, how was that financed?

A. Well, the Theatre Enterprises and the Pem Construction Company are both owned by my brothers and myself, and when they were transferred, a first mortgage in the amount of \$307,000 was made, and the balance was taken back by the Pem Construction Company which was, I say, owned by my brothers and myself, in a second mortgage, I think, of \$35,000—these figures may not be exact, but I think they are close enough—and in a chattel mortgage on the equipment of \$75,000. Pem Construction Company holds them both.

[220] MR. ROME:—\* \* \*. I offer in evidence as Plaintiff's Exhibit No. 28, copy of a letter on the stationery of Theatre Enterprises, Inc., addressed to Universal International Film Corporation, Attention Mr. [221] Martin, in Washington, D. C.

"Dear Mr. Martin:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'HAMLET' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars (\$7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars (\$7,850.00). We will also place any reasonable guarantee, the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture,

"It would be greatly appreciated, since time is most important, if you would reply at once to the above."

[222] MR. RABERY:—What is the date of that?

MR. ROME:—November 26, 1948.

(Letter, of November 26, 1948, Theatre Enterprises, Inc., to Universal International Film Corporation, was marked Plaintiff's Exhibit No. 28.)

Q. (By MR. ROME):—Did you have any response to that submission of a bid, Mr. Myerberg?

A. Not until Mr. Meyers visited my theatre sometime in November.

Q. What happened at that time?

A. As I recall now, Mr. Meyers had not received the bid in New York from the Washington office, but he said he would take it under advisement and, as I recall, asked Mr. Martin why he had not forwarded the bid to him. Mr. Meyers told me he would let me know about it.

Q. Did you have any other discussion with him at that time?

A. Only one remark that Mr. Meyers made, and that was that I built the theatre in the wrong place; if I had built it downtown, there would be no doubt about getting first-run pictures.

[226] MR. ROME:—Plaintiff's exhibit No. 29 is a copy of a letter from Mr. Fred Meyers on the stationery headed "Copy for W. A. Scully," addressed to Mr. H. J. Martin, Washington, D. C., dated January 14, 1949.

"Dear Mr. Martin:

"In reply to yours of the 14th relative to the Crest [227] Theatre, Baltimore, Maryland, operated by Harry D. Myerberg, it is our mutual decision to offer this exhibitor a first neighborhood run for same break date as all other neighborhood runs after the completion of the engagement in downtown Baltimore.

"Kindest regards. Sincerely, Fred Meyers."  
With carbon copies marked to go to Messrs. Scully, Gomersall, O'Keefe, J. Scully, Friedberg and Jordan.

**MR. ROME:**—If the Court please, I offer in evidence as plaintiff's exhibit No. 30 copy of a letter dated December 20, 1949, addressed to Columbia Pictures, New York City.

"Gentlemen:

"We wish to call to your attention our letter of [228] November 1, 1949 regarding the Crest Theatre in Baltimore, Maryland.

"We have not yet had a reply to this letter, but it is our hope that during this time the proposal that the Crest be given access to first-run pictures in Baltimore has been receiving favorable consideration. In other cities of the country such as Washington, Roanoke, Kansas City, Denver, and Los Angeles theatres located outside the so-called business section are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development and, consequently, offers a magnificent revenue-producing opportunity in this connection, and as further evidence of the conviction held by our client that the Crest is entirely suitable for first-run exhibition, we are authorized to submit to you our bid for the exclusive first-run exhibition in Baltimore at regular first-run admission prices of your picture 'Jolson Sings Again.'

"Our client is willing to pay a \$10,500 guarantee against 40% of the gross for this picture and will post the guarantee in the form of a certified check if this is deemed desirable.

[229] "It is firmly believed that this bid, as well as the actual play-off of the picture, if the bid is accepted, will conclusively demonstrate what a fine outlet the Crest is for the exhibition of your pictures on first-run in Baltimore.



"Will you please give this letter your early consideration and advise us of your decision?"

"Yours very truly, For Gray, Anderson, Schaffer & Rome."

MR. RAFTERY:—That was sent from your Philadelphia office?

MR. ROME:—Yes, it was.

THE CLERK:—This will be plaintiff's exhibit No. 30.

(Letter December 20, 1949 to Columbia Pictures from Gray, Anderson, et al., was marked Plaintiff's Exhibit No. 30.)

MR. ROME:—I offer in evidence as plaintiff's exhibit No. 31 a copy of a prepaid, straight telegram, dated January 9, 1950 to Mr. A. Montague, Columbia Pictures, Inc., New York City.

"We request opportunity to negotiate or bid for Crest Theatre, Baltimore, for 'All The King's Men.' Will guarantee \$7,000 against 40% of gross for extended first-run. Alternative bid, \$4,000 against 40% of gross for extended run day and date with downtown Baltimore." That letter was signed Gray, Anderson, Schaffer & Rome and was sent from our Philadelphia office.

[230] THE CLERK:—Plaintiff's exhibit No. 31.

(Letter January 9, 1950 to A. Montague, Columbia Pictures, from Gray, Anderson, et al., was marked Plaintiff's Exhibit No. 31.)

Q. (By Mr. Rome):—Mr. Myerberg, were any acknowledgments ever received to your knowledge from Columbia Pictures to these two bids?

A. Not to my knowledge, no.

Q. Were those pictures ever licensed to you for exhibition first-run at the Crest Theatre?

A. No, sir.

Q. Now, the bid on "All The King's Men," Mr. Myerberg, refers to a bid, exclusive run and an alternative bid. What was meant by that?

. . . . .

[231] A. As I recall, that was some time the latter part of 1919, after the theatre had been opened about six or eight months, and we had not been able to license any first-run pictures in Baltimore.

MR. RAFFERTY:—I move to strike out everything so far he has asked. The question was what was meant, and he starts telling about what happened.

THE COURT:—That may be proper introduction. You say the letter speaks for itself, Mr. Rafferty. I don't know what it means. I do not suppose the jury does, either. So, I think certainly it needs explanation.

Go ahead, sir.

THE WITNESS:—And I had at that time felt it necessary, getting no place with these companies, no license on first-run pictures, to look into the matter through an attorney who was experienced in the picture business, and I engaged Gray, Anderson, Schaffer & Rome, of Philadelphia, for that purpose and asked them to further submit bids to the different companies, to see if they could not do something relevant to that with these companies. And they submitted the bid that you just heard. And the second bid, when I asked them to submit them, was purely they will play the pictures first-run or play them day and date downtown, and that was the way the bid was submitted, and we felt the same bid on the "Jolson [232] Story" on day and date on simultaneous run, that meant we would buy at the same price.

THE COURT:—What do you mean by "day and date"?

THE WITNESS:—At the same time the downtown theatres would be playing, if we would be playing the picture. "Exclusive," of course, would be exclusive of the City of Baltimore.

MR. ROME:—May I call upon you, Mr. Rafferty, for a copy of a letter from Mr. George Josephs to Mr. Galanty, dated November 4, 1919?

If the Court please, I offer in evidence as plaintiff's exhibit No. 32 a letter on the stationery of Columbia Pic-

tures Corporation, 727 Seventh Avenue, New York, dated November 4, 1949, addressed to Mr. S. A. Galanty, Columbia Pictures Corporation, Washington, D. C.

"Dear Sam:

"Attached is a copy of a letter which we received from the attorneys for the Crest Theatre, Baltimore, Maryland. Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first-run on our product. We do not intend to reply to this letter and are sending it to you for your information.

"Kindest regards, Sincerely, George." Signed:  
"George M. Josephs."

[233] **THE CLERK:**—Plaintiff's exhibit No. 32.

(Letter November 4, 1949, Attorneys for Crest Theatre to S. A. Galanty, was marked Plaintiff's Exhibit No. 32.)

**MR. ROMA:**—A letter from Mr. Caplon to Mr. Josephs, dated August 7, 1950 and a letter to Mr. Caplon from Samuel Reice, dated August 25, 1950.

If the Court please, I offer in evidence as plaintiff's exhibit No. 33 a copy of a letter dated August 7, 1950, addressed to Mr. George Josephs, Columbia Pictures Corporation, 729 Seventh Avenue, New York.

"Dear George:

"On June 15th, I wrote you and attached a letter from the Crest Theatre, Baltimore, Maryland, wherein they requested the bidding privilege against the Uptown, Pimlico and Avalon Theatres.

"The exhibitor has asked me several times what disposition we have made of his request, and I would appreciate your further advice in this matter.

"Kindest regards, Sincerely, Ben Caplon, Branch Manager."



**THE CLERK:**—That will be plaintiff's exhibit No. 33.

(Copy of letter August 7, 1950 Caplon to Josephs, was marked Plaintiff's Exhibit No. 33.)

**MR. ROME:**—If the Court please, I offer in evidence as plaintiff's exhibit No. 34 a copy of a letter on the [234] stationery of Schwartz & Frohlich, 19 East 70th Street, New York 21, New York, dated August 25, 1950, addressed to Mr. Ben Caplon, Columbia Pictures, 928 New Jersey Avenue, Northwest, Washington 1, D. C.

"Dear Ben:

"This is in reply to your several letters addressed to George Josephs regarding the exhibitor's demand for an improved availability.

"As I understand the situation the Crest is playing Columbia product on a first-run availability. Columbia is under no obligation to grant the exhibitor clearance over the Avalon, Uptown and Pimlico and it would seem desirable to retain the status quo. If there are any reasons for treating with the situation differently I would appreciate hearing from you.

"It would be preferable, Ben, in further communications relating to this situation and any others dealing with availability, clearance or related subjects be sent directly to Schwartz & Frohlich.

"With all best wishes—

"Sincerely, Samuel Reice."

**MR. RAFTERY:**—What was the date of that communication?

**MR. ROME:**—August 25, 1950.

**MR. RAFTERY:**—And that was after this suit was [235] started?

**MR. ROME:**—That is correct.

**THE CLERK:**—Plaintiff's exhibit No. 34.

(Letter August 25, 1950, Reice to Caplon, was marked Plaintiff's Exhibit No. 34.)

. . . . .

[237] Mr. ROMB:—If the Court please, I offer as Plaintiffs' Exhibit 35 a letter on the stationery of Paramount Pictures Inc., Washintgon, D. C., dated November 1, 1948, addressed to Mr. Harry Myerberg, Theatre Enterprises, Inc.

(Reading:)

"November 1, 1948

"Mr. Harry Myerberg

"Theatre Enterprises, Inc.

"302 Park Avenue

"Baltimore 1, Md.

"Dear Mr. Myerberg:

"I have for acknowledgment your letter of October 14, 1948, supplying information relative to the new, but as yet unnamed theatre, with which you are connected, which is expected to open on or about November 15 next and requesting the opportunity to bid for Paramount product for exhibition first run Baltimore in that theatre.

"I beg to advise that it has not been in the [238] past, and still is not Paramount's policy to engage in so-called competitive bidding unless it is compelled to do so by some court of competent jurisdiction.

"Upon further consideration of the matters discussed, at our recent meeting, and also of the contents of your letter of the above date, we are still of the opinion that the business and financial interests of Paramount will be served best by the continued exhibition of Paramount pictures first run Baltimore in theatres situated in the downtown business and shopping area of that city rather than in a theatre located in a suburban area. It is to be regretted therefore, that in the exercise of our sound business judgment, your offer to bid competitively for Paramount product for exhibition first run Baltimore in the new theatre, which is located at 5521-29 Reigertown Road, cannot be entertained. However, we shall be pleased to negotiate with you from time to time, for the exhibition

in the new theatre of such Paramount product as may become available, on a picture by picture basis, on some run, on terms to be mutually agreed upon.

"Please accept our best wishes for the success of the new theatre's opening and also for the continued success of its future operation.

"Kindest personal regards.

[239] "Very truly yours,

"(Sgd) A. C. Benson  
"Branch Manager"

(Letter, November 1, 1948, A. C. Benson, Paramount Pictures Inc., to Mr. Harry Myerberg, was marked Plaintiff's Exhibit No. 35.)

[242] If the Court please, I offer in evidence a picture copy of a letter on the stationery of Paramount Pictures Inc., Washington, D. C., dated February 9, 1949, addressed to Mr. E. K. O'Shea, Home Office, "re: Crest, Baltimore, Md. 5521-29 Reistertown Rd. Baltimore, Md.

"Dear Mr. O'Shea:

"The above mentioned theatre is under construction, and will open in the latter part of February. The theatre is owned by Mr. Harry Myerberg, Theatre Enterprises, Inc., 302 Park Ave., Baltimore, Md., which has approximately 1500 seats.

"Mr. Myerberg has visited this office and written [243] us several times in an endeavor to secure a first run availability in the City of Baltimore for the above mentioned theatre. This, we have refused to give him (see correspondence file—Mr. Thomas P. Gibbons, Legal Department). Mr. Myerberg has again contacted us and requested that we license pictures for exhibition in the Crest Theatre on a 21 day availability.

"The Crest Theatre is in opposition to the Garman's Uptown and Pimlico Theatres, being located approximately



one mile distance from the Uptown, and drawing from the same area. Under normal conditions and to avoid litigation, I believe that if an equal availability is given the Uptown and Crest, it will be acceptable to both operators. We have not committed ourselves, as per the correspondence files, to a run in this situation so far as the Crest Theatre is concerned.

"We have been regularly serving the Uptown and Pimlico Theatres on a 21 day basis, the majority of our pictures playing the Uptown. The Uptown Theatre is probably one of the finest theatres in the country, as you know. The Crest is equally as beautiful and is larger than the Uptown.

"My recommendation is that the Crest Theatre be served on a 21 day availability.

"Please advise.

[244]

"Very truly yours,

"(Sgd) A. C. Benson

"Branch Manager

"cc: Mr. E. W. Sweigert"

(Copy of letter, February 9, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. E. K. O'Shea, was marked Plaintiff's Exhibit No. 38.)

MR. RAFTERY:—We retyped this one, because the other was so bad, you cannot read it.

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 39, a copy of a letter on the stationery of Paramount Pictures, Inc., Washington, dated February 15, 1949, "re: Crest Theatre 5521-29 Reistertown Rd. Baltimore, Md.

"Dear Mr. Gibbons:

"In reply to your letter of February 11, 1949, and in reference to previous correspondence.

"Page 1, paragraph 2: Mr. Myerberg submitted various opening dates starting with October 14, 1948 for the opening of the above theatre. The house was not ready

and completed at that time, but will be finally and formally opened on February 20, 1949.

"Page 1, paragraph 3: In reply to your inquiry as to the door to door mileage between the several theatres involved, we wish to advise that the Pimlico and Uptown Theatres, both owned and operated by Mr. Garman, are both situated on the west side of Park Heights Ave., one block apart.

[245] "The distance from the Pimlico or Uptown Theatre to the Crest is, as follows:

"Route 1: Uptown—Park Heights Ave. to Rogers Ave. to the Crest Theatre—8/10ths miles;

"Route 2: Uptown—Belvedere Ave. to Reistertown Road to the Crest—one mile.

"Page 1, paragraph 4: The following is the seating capacities of the theatres involved:

"Uptown 1,100 seats

"Pimlico 1,140 "

"Crest 1,650 " "

\* Architect's estimate—seats being installed now.

"Page 1, paragraph 5: There is no doubt that adding the Crest to the 21 day houses in Baltimore will add to the print problem. The problem can be met satisfactorily with the exception of our top flight pictures.

"Page 1, paragraph 6: In reply to your inquiry as to the reactions of the exhibitors to (a) competitive negotiation; and (b) division of the product, we wish to advise, as follows:

"(a) Mr. Garman, the operator of the Uptown and Pimlico Theatres, has never bid on a picture from any company, and advises us that he will never enter competitive negotiations, and our [246] experience with him over a number of years convinces us that he means just that. Mr. Myerberg would enter the competitive negotiations only on top flight pictures, passing all others, or as many as possible.

"(b) The possibility of a division of the product between the Uptown and the Crest could not be satisfactorily handled in this situation. At the present time, as per the attached Forms 2554, you will note that all of our important pictures receive the proper consideration from Mr. Garman, and play the Uptown Theatre. You will further note that they receive the proper preferred time and also note that the lesser pictures also receive proper consideration and play time. I feel that, if the product were divided, this condition would not continue, as Mr. Garman would not have the interest in the lesser pictures that he has under the present conditions. As to the half of the product which would be licensed to the Crest: The liquidation of this half of the product would be complicated by the fact that Mr. Myerberg has announced a policy of vaudeville 3 days per week. Therefore, with one theatre, he could not absorb 50% of all product [247] available plus the product he purchases 100%. He would, therefore, be forced to pass many of the lesser pictures. Mr. Myerberg formerly operated other theatres in Baltimore, and experience again has taught us that lesser pictures would not receive fair consideration in his operation.

"Page 2, paragraph 1: Other distributors are selling the Crest Theatre on a 21 day availability. The theatre will open with *WORDS AND MUSIC*, a Metro top flight picture on a 21 day availability. We know that *DON JUAN*, a Warner picture, has been licensed to the Crest on a 21 day availability. We know that Columbia and Universal are now negotiating on a 21 day availability and we know of no company which has refused to negotiate on that same basis.

"From a distribution angle, it would be to the advantage of Paramount to play on a 21 day availability in the Uptown or Pimlico and have the Crest follow either one of these two theatres, but I am sure that you recognize the position we are in from a legal angle.

"We cannot tell what the practical working out of this



problem will be. We will not know until after the policy of the Crest Theatre is definitely set.

"My recommendation is that the Crest be served on a 21 day availability. Our only problem then will be a print problem.

[248] "Please advise if I can be of any further service.

"Very truly yours,

"(sgd) A. C. Benson

" Branch Manager

"Attachments:

"ACT:rhs

"cc: Mr. E. K. O'Shea  
Mr. E. W. Sweigert"

(Copy of letter, February 15, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. Thomas P. Gibbons, was marked Plaintiff's Exhibit No. 39.)

[250] Mr. Rome:—I offer in evidence, as Plaintiff's Exhibit 40, a copy of a letter dated June 25, 1951, addressed to Mr. Phil Isaacs, Branch Manager of the Paramount Washington Branch office, "Re; Ontario Theatre, Washington, D. C.

"Dear Phil:—"

[251] Mr. Raftery:—Just a minute. What is the date of that?

Mr. Rome:—June 25, 1951.

Mr. Raftery:—I am not going to object. Go ahead.

Mr. Rome:—(Reading).

"Dear Phil:

"I am in receipt of a copy of your communication of June 21st with which you enclosed copy of a letter dated June 11th addressed to you from Mr. Frank M. Boncher, General Manager of the Kogod-Burka Circuit, owner of the above theatre, which presently is in the course of erection and which you advise will be ready to

open around the latter part of October, advising that they are interested in two things, '(1) securing a good picture from you for the opening which could be either on a day and date basis with down town run, or an exclusive first in the city, and' (2) we are interested in discussing with you the possibility of playing your product day and date with your down town run on the same basis as it is now being played in the Ambassador. In other words, on pictures that do not play the Ambassador, we would be interested in on the same basis.'

"Inasmuch as the theatre is in the course of construction and not ready for operation, no immediate decision need be made. However, the problem exists and [252] necessarily must be met at some future date, at which time we will have to do one of two things, (a) refuse the request, or (b) grant it.

"I know little of the facts and some time at your convenience, I would appreciate it if you would furnish me with the following information: (a) the location of the Ontario (b) its seating capacity (c) its distance from the downtown area (d) its distance from the Ambassador, etc.

"Of course, an exclusive first run in Washington is out of the question. However, if the Ontario is in substantial competition with the Ambassador, it might be a case, depending upon the facts, for a division of the product between the two theatres or for competitive negotiations between them for a first run on a day and date basis with downtown Washington.

"Please keep me advised.

"Sincerely yours,

"THOMAS P. GIBBONS"

"cc: Mr. H. G. Minsky"

(Copy of letter, June 25, 1951, Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch Office, was marked Plaintiff's Exhibit No. 40.)

[253] Q. (By MR. ROME):—Mr. Myerberg, if you know whether the Ontario Theatre, in Washington, presently exhibits Paramount pictures on first run, do you know whether or not that is on an exclusive first run or on a day and date first run basis?

A. It is done on an exclusive first run, City of Washington.

MR. ROME:—I offer in evidence as plaintiff's exhibit No. 41 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D. C., dated June 28th, 1951, re Ontario Theatre, Washington, D. C., addressed to Mr. Thomas P. Gibbons, Legal Department, Home Office.

"Dear Mr. Gibbons:

"With reference to your letter of June 25, 1951, I am herewith outlining all facts pertinent to the request made by Mr. Frank Boucher, General Manager of the Kogod-Burka Circuit, owners of the above theatre, presently in the course of erection.

"The Ontario Theatre located at 17th and Columbia Road, N.W., will have 1301 seats upon completion sometime during the month of October. It is located approximately  $2\frac{1}{2}$  miles from the downtown area and two blocks from the Ambassador Theatre.

"At present, we are splitting our product first run [254] Washington between Loew's Palace, Capitol or Columbia Theatres and Warners' Warner, Ambassador or Metropolitan Theatres. Those pictures which play the Loew situation play one theatre exclusively; whereas, Warners day and date their pictures in the Warner and Ambassador, the Metropolitan playing an exclusive first run.

"The Warner Theatre, located in downtown Washington, contains 2154 seats; the Ambassador Theatre, 1344; the Metropolitan, 1484. As regards the Loew situations, the Palace Theatre has 2423 seats; the Capitol, 3133; and the Columbia, 1174 seats.



"With reference to the last paragraph of your letter, I believe that the operators of the Ontario Theatre are primarily interested in setting up in their theatre the same playing arrangement with Loew's first run as now exists in the Ambassador Theatre with regard to the Warner downtown run.

"It is not necessary that action be taken at this time, as the theatre has not yet reached the completion stage. I will, however, keep you informed of all further developments in this situation.

"Kind Regards."

[255] There is a carbon copy to Mr. Howard Minsky.

(Letter, June 28, 1951, Phil Isaacs to Thomas P. Gibbons, was marked plaintiff's exhibit No. 41.)

MR. ROME:—I offer in evidence, as plaintiff's exhibit No. 42, a copy of a letter dated July 30, 1951, signed "Phil Isaacs," Branch Manager of Paramount, Washington, addressed to Mr. Howard Minsky, Philadelphia Office.

"Dear Howard:

"Kogod-Burka have again written to me, as per the attached letter, requesting first run product for the Ontario Theatre, Washington, D. C.

"I have previously written Tom Gibbons, giving the physical facts pertinent to this theatre, that is, location, appointments, etc. While it is not a problem at this particular moment, you can well see that if the point is pushed, it can result in a real whopper. Warners now take the stand since Frank Boucher has made this request of all major companies that, if we go so far as to permit bidding between the Ambassador and Ontario Theatres (sic), they will ask that the Tivoli Theatre be included in those negotiations. This could lead to one fine mess.

"I would appreciate your advice as to our course in this matter since these things have a habit of sneaking up on you and October is really not too far away. I don't know for sure exactly how far Boucher will want to go

with [256] this Ontario Theatre. Of course, our first offer can be 21 days after downtown and even there we may have some difficulty.

"I would like to discuss this further with you the next time we talk.

"Kind regards."

There is a carbon copy marked to Mr. Thomas P. Gibbons.

The attached letter referred to is on the stationery of K-B Theatres, 4813 Massachusetts Ave., N.W., Washington 16, D. C., dated July 19, 1951, and is addressed to Mr. Phil Isaacs, Branch Mgr., Paramount Distributing Corporation, Washington, D. C.

"Dear Phil:

"As you know, the Ontario Theatre will be ready the middle of October. We have previously advised you we are interested in first run product, either on a date and date basis with down town, or an exclusive first run basis.

"You have such pictures as DEAR BRAT, RHUBARB, HERE COMES THE GROOM, MY SON JOHN, DETECTIVE STORY and PEKING EXPRESS in which we are interested for this theatre. If they have not been sold in Washington we would like very much to have the opportunity of discussing the possibility of having these pictures for the Ontario.

"There is no need for me to tell you the Ontario [257] will be Washington's finest theatre. No expense has been spared to make it one of the outstanding theatres in the entire section. We feel the house has tremendous possibilities. You should have an accurate knowledge of this, as you have been serving the Ambassador, just a short block away, with first run product.

"May we hear from you in regard to these first run pictures."

(Letter, July 30, 1951, Phil Isaacs to Mr. Howard Minsky, with attached letter of July 19, 1951, Frank M. Boucher to Phil Isaacs, were marked Plaintiff's Exhibit No. 42.)

*Harry D. Myerberg, Direct.*

Mr. Rome:—If the Court please, I offer in evidence as Plaintiff's Exhibit No. 43 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D. C., addressed to Mr. Tom Gibbons, Home Office, dated August 24, 1951.

"Dear Tom:

"I am attaching hereto a copy of a letter from Fred Kogod, owner of the Ontario Theatre, Washington, D. C., about which I have previously written you.

"You have all the physical facts relative to seating capacity and distances between theatres; further than that, this is a rather ticklish situation as you can readily understand. I would appreciate any comments you care to make as soon as convenient.

[258] "Your very truly,

"/s/ Phil Isaacs

"Branch Manager"

There is a copy marked as going to Mr. Howard G. Minsky.

The attached letter, ladies and gentlemen, is on the stationery of K-B Theatres, Washington, D. C., dated August 20, 1951, addressed to Mr. Phil Isaacs, Branch Manager, Paramount Film Distributing Corporation, Washington, D.C.

"Dear Phil:

"Our new Ontario Theatre, located on the corner of 17th and Columbia Road, N.W., just a short distance from the Ambassador at 18th and Columbia Road, will be completed and ready to open shortly after the first of October. As we have previously advised you, this will be a deluxe house of 1400 seats, incorporating the very latest and finest in theatre design and construction. It is located in one of the most thickly populated commercial and residential areas of Washington, and is readily accessible to the residents of the entire Northwest section of the city,



and to the other sections of the city as well. We are very proud of this house. We started out with the idea of making it the most attractive and comfortable theatre in the city—and we are confident that we have accomplished [259] that objective. So far as the District of Columbia theatregoers are concerned, the Ontario will be second to no other theatre in that area.

"From the very beginning it has been our plan to operate the theatre as a first run house—indeed, in view of the cost of the house it will be necessary to operate on that policy and charge first run admission prices in order to have it pay out.

"In view of the fact that the opening date is not too far off, we are anxious to make arrangements for pictures in the very near future. For many years Paramount has split its product between the Warner and Loew's downtown houses in Washington. That part of the split which plays at the Warner has been exhibited day and date first run at the Ambassador. We are interested in obtaining from your company for day and date first run showing that part of your product which plays first run downtown. In view of the superiority of our theatre, we are confident that such a policy would be even more successful there than at the Ambassador. We are also interested in obtaining from your company for first run exhibition those pictures which will not be shown in the other downtown first run houses.

"If you are in position to discuss this matter with us in further detail, we shall be only too happy to [260] sit down with you in person in the near future. On the other hand, if this is a matter that should properly be taken up with the home office in New York, we will be very happy to go up there for a conference at some mutually convenient time in the near future.

"Very truly yours,

"/s/ Fred S. Kogod"

*Harry D. Myerberg, Direct.*

There is also an attachment, ladies and gentlemen, of a copy of the reply from Mr. Isaacs to Mr. Kogod, dated August 24, 1951.

"Dear Mr. Kogod:

"Thank you for your letter of August 20, 1951 wherein you outline your request with regard to a run in the Ontario Theatre, Washington, D.C.

"I have forwarded a copy of your letter to our Home Office in New York and immediately upon receipt of advice from them I will be glad to get in touch with you.

"Kind regards.

"Yours very truly,

"(Sgd) Phil Isaacs  
"Branch Manager."

(Letter, August 24, 1951, Phil Isaacs, Branch Manager to Mr. Tom Gibbons; letter, August 24, 1951, Phil Isaacs to Mr. Fred Kogod; and letter, August 20, 1951, Fred S. Kogod to Mr. Phil Isaacs, were marked Plaintiff's Exhibit No. 43.)

Mr. Rome:—If the Court please, I will offer in [261] evidence next, as Plaintiff's Exhibit No. 44, a copy of a letter dated September 10, 1951, from Mr. Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch of Paramount, "Re: Ontario Theatre, Washington, D.C."

"Dear Phil:

"Reference is made to your letter of August 24th which was received during my absence on vacation and also to our telephonic interview of September 5th in the above matter.

"I discussed the exhibitor's request with Mr. Phillips, stressed the importance of the matter and conveyed Mr. Minsky's feeling that a conference should be held relative to it.

"I will advise you as soon as I have anything definite to report.

"Kindest personal regards.

"Sincerely yours,

"(Sgd) Thomas P. Gibbons."

And there is a carbon copy marked going to Mr. H. G. Minsky.

(Letter, September 10, 1951, Thomas P. Gibbons to Phil Isaacs, Branch Manager, was marked Plaintiff's Exhibit No. 44.)

Q. (By Mr. Rome):—Mr. Myerberg, do you know whether [262] or not the Ontario Theatre in licensing its first-run pictures from Paramount, is presently doing so on the basis of competitive bidding for those pictures?

A. Yes. It is my understanding that they are competitive bidding for the pictures.

Mr. Raftery:—We concede these telegrams were sent back and forth, without proof from the witness.

Mr. Rome:—If the Court please, I will offer in evidence Plaintiff's Exhibit No. 45, a copy of a telegram addressed to Ted O'Shea, Paramount Pictures Inc., Paramount Bldg., Broadway.

"OFFER 10000 DOLLAR GUARANTEE AGAINST FORTY PERCENT OF GROSS FOR EXTENDED RUN OF YOUR PRODUCTION SORROWFUL JONES STARRING BOB HOPE TO PLAY OUR NEW 1700 SEAT CREST THEATRE FIRST RUN BALTIMORE IMMEDIATE ANSWER IS REQUESTED

"THEATRE ENTERPRISES INC HARRY D. MYERBERG,  
PRESIDENT"

This is dated May 12, 1949.

(Copy of telegram, Theater Enterprises Inc. to Ted O'Shea, Paramount Pictures Inc., May 12, 1949, was marked Plaintiff's Exhibit No. 45.)



Mr. Rome:—I offer in evidence as Plaintiff's Exhibit No. 46 an original telegram addressed to Harry D. Myerberg, Crest Theatre, May 13, 1949.

"FULL CONSIDERATION OF YOUR REQUEST AND OFFER ON SORROWFUL JONES LEADS ME TO CONCLUSION THAT WE WOULD [263] PREFER EXHIBIT OUR PICTURES FIRST RUN IN BALTIMORE IN A LARGE DOWNTOWN THEATRE. REGARDS.

"TED OSHEA."

(Telegram, May 13, 1949, Ted Oshea to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 46.)

. . . . .

[264] Mr. Rome:—If the Court please, I offer in evidence as plaintiff's exhibit No. 47 a copy of a letter on the stationery of Paramount Pictures, Inc., 306 H Street, Northwest, Washington, D. C., dated November 14, 1949, re: Crest Theatre, Reisterstown Road, Baltimore, Maryland, addressed to Mr. Thomas P. Gibbons, legal department, home office.

"Dear Mr. Gibbons:

"This will acknowledge receipt of your letter of November 7, 1949, in which you enclosed a copy of a letter, dated November 1, 1949, addressed to Paramount Pictures, Inc., Times Square, New York City, from Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., signed by Edward P. Rome.

"In the above letter, Mr. Rome advises that he has been retained by Theatre Enterprises, Inc., who operates the Crest Theatre, Reisterstown Rd. and Rogers Ave., Baltimore, and that he is fully acquainted with the efforts that have been made during the past year to obtain first-run Baltimore pictures for the Crest Theatre. Mr. Rome is again renewing that request and calls our attention to the fact that without experimenting with the exhibition of Paramount Pictures first-run in the Crest, it is not possible

to determine that such a [265] policy would be unprofitable for Paramount.

"In my letter to you of February 15, 1949, I gave a detailed report on the Crest Theatre and the theatres surrounding it, and advised you in a letter, dated May 27, 1949, that the Crest Theatre is situated 6-1/10th miles from the nearest downtown theatre in the City of Baltimore playing first-run product.

"Mr. Myerberg, the owner and operator of the Crest Theatre, made several offers with substantial guarantees for first-run product. We elected not to accept these offers.

"The Crest Theatre is now playing Paramount product on a 21-day availability and paying the same terms and playing on the same days as comparable houses in the City of Baltimore, and our relationship with this account is excellent.

"On May 12, 1949, Mr. Myerberg wired Mr. O'Shea, offering the following terms on *SOMAKOWFUL JONES*:

" '\$10,000 guarantee against 40% of the gross for an extended run at the Crest Theatre, first-run Baltimore.

" 'This picture played at Keith's Theatre, Baltimore, 6/28-7/19/49, inclusive, 22 days, to the following terms:

" 'First week	40%
" 'Second week	35/50/9,000
" 'Third week and one day	25%
" 'Total film rental	10,052.'

"In a letter dated August 12, 1949, Mr. James J. [266] Lindsay, on behalf of the Theatre Enterprises, Inc., offered \$12,500 guarantee against 40% of the gross on *TOR O' THE MORNING* to play the Crest Theatre, Baltimore, first-run City of Baltimore.

"This picture was licensed to the Stanley Theatre, Baltimore, and played 9/16-29/49, inclusive. The contract terms were as follows:

"First week 37½% of the gross \$9,684—rental \$3,632

"Second week 37½% of the gross \$4,713—rental \$1,178"

---

\$4,810

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\$14,397

\* Sold 37½% of the gross—will probably be adjusted to 25% because of low gross.

(The above therefore figured at 25%.)

"From the above, it is apparent that the offer from Mr. Myerberg is far greater than the rental earned on TOP O' THE MORNING at the Stanley Theatre.

"However, the offer of \$10,000 on SORROWFUL JONES is approximately the same amount of money as we secured for the film rental of the exhibition of this picture in Keith's Theatre in Baltimore.

"In making a decision to change the first-run on Paramount product from a first-run downtown theatre located in the heart of the shopping center in a big metropolis to a [267] suburban theatre depending almost entirely on automobile trade, it is necessary that we take into consideration the effect this change would have on the other suburban theatres and also whether or not the suburban theatre playing first-run could profitably carry the enormous guarantee they would post in order to obtain a first-run.

"In view of our experience and in the exercise of our sound business judgment, we feel that the interest of Paramount would be best served by the continued exhibition of our product first-run (Baltimore) in a large theatre situated in the downtown business and shopping area of the City rather than in a theatre located in a suburban area as in the case of the Crest, and I firmly believe that an experiment of playing first-run in the Crest Theatre would prove our judgment to be correct.

"The only condition under which I recommend playing the first-run in the City of Baltimore in the Crest Theatre would be solely for the purpose of avoiding litiga-



tion, as my business experience and judgment convince me that the exhibitor and the distributor would lose financially as a result of the change.

"Very truly yours,

"(Sgd) A. C. Benson, Branch Manager."

With carbon copies to A. W. Schwalberg, E. K. O'Shea, and H. A. Goldstein.

[268] THE CLERK:—Plaintiff's exhibit No. 47.

(Letter November 14, 1949 Benson to Gibbons, was marked Plaintiff's Exhibit No. 47.)

Q. (By MR. ROME):—Mr. Myerberg, with regard to the bids you submitted on the TOP O' THE MORNING and SORROWFUL JONES, would you have been willing to play those pictures in your theatre day and date with a theatre playing them downtown and pay the same rental terms you offered in the bids that you made?

A. Yes, I would have.

. . . . .

MR. ROME:—If the Court please, I offer as plaintiff's exhibit No. 48 a copy of a letter dated December 3, 1949, on the stationery of Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., addressed to Mr. Thomas P. Gibbons, Esq., re Crest Theatre, Baltimore, Maryland.

[269] "Dear Mr. Gibbons:

"May I recall to your attention my letter of November 1, 1949 regarding the Crest Theatre, in Baltimore, Maryland? On November 7th you informed me that after consultation with your Washington branch we would hear further from you but as yet we have not.

"We trust that during this time the proposal that the Crest Theatre be given access to first-run pictures has been receiving favorable consideration. It is our information that in other cities of the country, such as Washington, Roanoke, Kansas City, Denver and Los Angeles, theatres

located outside of the downtown business sections are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of the cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development.

"In this connection it is our understanding that Paramount has presently available for release two pictures *THE HEIRESS* and *SAMSON AND DELILAH*. Both of these pictures are obviously "class attractions" which would be ideally suited for first-run showing at the Crest Theatre, located as it is in a growing shopping area in the very center of 90% [270] of the better residential area of Baltimore City and County, running from Catonsville on the west to Towson on the east. It is reasonable to expect that the great number of persons who will go to see these pictures will come predominantly from this area. It is the fact that these residents are situated geographically closer to the Crest than they are to downtown Baltimore. It is also the fact that the ample free parking facilities adjacent to the Crest represent an additional attraction.

"Our client is very desirous for the opportunity to exhibit *THE HEIRESS* and *SAMSON AND DELILAH*. We are, therefore, authorized to communicate to you the following bid:

"Ten thousand five hundred dollars (\$10,500.) guarantee against 40% of the gross for an extended first-run of *THE HEIRESS* at the Crest Theatre.

"Thirty-five thousand dollars (\$35,000.) guarantee against 50% of the gross for an extended first-run of *SAMSON AND DELILAH* at the Crest Theatre.

"Our client will also agree to set a minimum gross figure that would control the completion of the engagement of these pictures.

✓ "We are confident that these bids as well as the actual

playoff of the pictures will amply demonstrate the eminent feasibility of exhibiting your pictures first-run [271] at the Crest.

"May we hear from you at your earliest convenience?

"Yours very truly,

"(Sgd) Edwin P. Rome,

"For Gray, Anderson, Schaffer & Rome"

THE CLERK:—Plaintiff's exhibit No. 48.

(Letter December 3, 1949 (carbon copy) Rome to Gibbons, was marked Plaintiff's Exhibit No. 48.)

MR. ROME:—If the Court please, I should like to read to the jury the answer of Paramount Pictures to interrogatory numbers 11, 12 and 13, which give the play-off of the particular pictures that have been discussed here in the City of Baltimore, and shows the film rental actually received by Paramount.

SAMSON AND DELILAH, a special pre-release engagement at the Stanley Theatre and played again in the Stanley Theatre on a first-run regular release. THE HEIRESS and TOP O' THE MORNING also played at the Stanley. SORROWFUL JONES played at the Keith's. Paramount received a film rental from the special pre-release engagement of SAMSON AND DELILAH of \$22,990 and received a further film rental from the first-run general release of SAMSON AND DELILAH \$4,105. From THE HEIRESS Paramount received a film rental of \$4,074 and from TOP O' THE MORNING received a film rental of \$4,326 with a \$242 credit by reason of a reduction in terms of the first week's engagement from 37½% to 35% again to [272] the exhibitor.

Paramount received from the exhibition first-run Baltimore of SORROWFUL JONES, \$10,053. Paramount also received as a total amount of film rental received from subsequent run less fees in Baltimore of these pictures as follows:



THE HEIRESS ..... \$9,097

TOP O' THE MORNING ..... 9,961

SORROWFUL JONES ..... 16,890, the figure

as to SAMSON AND DELILAH not being available at the time of the answer to the interrogatories.

Q. (By Mr. Rome):—Mr. Myerberg, you stated that your theatre opened February 26, 1949; is that correct?

A. Yes, sir.

Q. Did anything happen in connection with the pre-opening of the Crest Theatre?

A. Well, we had two events: The first was a dinner that we served in the television lounge of the theatre in which we invited all of the distributors from Washington and the general sales managers from New York and the district managers and Eastern division managers, and some newspapermen, and as I recall the then president of the different theatre organizations in the city, to show them the theatre in a completed state.

Q. Excuse me, Mr. Myerberg. Do you recall when that occasion was?

[273] A. It was either two or three days prior to the opening of the theatre.

Q. What happened on that occasion?

A. Well, the little dinner was given purposely to make more acquainted especially those people from New York if they would come in, and, incidentally, no one came in from New York, and the only ones there were the Washington branch managers and some division managers whose offices were in Washington, and salesmen.

And I at that time, again, after they had seen the theatre, and during the evening, would get one or two together and ask them, after seeing the theatre, after seeing the situation, ask them personally whether they could not in some way help me get the runs the theatre should require, that is, first-run, day and date with downtown Baltimore, on an exclusive basis they had authority to sell.

Q. Who was there according to your recollection, from the various companies?

A. I don't know that I can remember them all, but I will try to remember them company for company.

[274] From Loew's Incorporated, there was Mr. Adams, the Washington branch manager, and Mr. Prince, the Washington salesman for the Baltimore area.

From Paramount, there was Mr. Benson, the branch manager, and Mr. Thompson, the sales manager or salesman for the Baltimore area. From Twentieth Century-Fox, there was Mr. Contee, who was then the sales manager of Twentieth Century-Fox, Washington Branch Office, and Mr.—I don't recall his name at this moment, was the salesman of the Washington branch office. From Columbia, I think there was Mr. Wingfield, the salesman in this area for Columbia Pictures. From United Artists, it was Mr. Silvers, who was the Eastern or Division Manager for this area, and Mr. Price, the Branch Manager of Washington, and their salesman—it was either Mr. Young or Mr. Rose.

Q. Was anyone there from RKO?

A. It was Mr. Kahn, who was then the salesman of RKO in this territory; and from Warner Bros., there was Mr. Smeltzer and Mr. Biersdorf. Mr. Smeltzer was Division Manager, and Mr. Biersdorf was Branch Manager in Washington, and Mr. DeFaizio, who was then the Baltimore salesman.

Q. Was there anyone there from Universal?

A. I don't recall who was there from Universal.

Q. What, if anything, happened on that occasion, Mr. Myerberg?

[275] A. I remember one time that Mr. Smeltzer and Mr. Adams and Mr. Biersdorf and myself were sitting at Mr. Smeltzer's table, and I again renewed my request, and the conversation, although I don't remember the exact conversation, it was to the effect that, "You know we can't do that. You are not going to get that from any

company. You might as well take these pictures on a 21-day basis and make the best of it." And I had a similar conversation with Mr. Price and Mr. Benson, and possibly Mr. Thompson, there at the same time. I asked them the same question, and I got practically the same answer, that nobody was going to do this; that it was an impossible thing to do, and the New York office would not go along with it. "We don't make the decisions; they make them. We submit it to them and these are the answers, and we can't do anything about it."

Q. Is there anything that occurred, anything else that occurred on that occasion?

A. Well, everyone there, I think, without exception was pleasantly surprised to see the way the theatre had finished, and the beauty of the theatre, its appointments, its equipment, which they had leisure time to inspect, because there was no performance that evening.

Q. With what picture did the theatre actually open?

A. Warner Bros. picture, DON JUAN.

[276] Q. And that you played on a first-run-subsequent-run availability in the city of Baltimore?

A. Yes.

[279] Mr. Rome:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 50, a copy of a letter dated November 2nd, 1949, addressed to Twentieth Century Fox Film Corporation, New York, from me:

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc. of Baltimore, Maryland, which operates the Crest Theatre at Reiserstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"The idea of first run pictures at the Crest is in



full accord with statements that have been made on behalf of your company and justifies the interest that has been expressed earlier by some of your representatives. It is our thought, therefore, that the situation deserves further attention.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary [280] growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this [281] suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our

client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated."

(Copy of letter, November 2, 1949, Mr. Rome to Twentieth Century-Fox Film Corporation, was marked Plaintiff's Exhibit No. 50.)

MR. ROME:—If the Court please, I offer in evidence as Plaintiff's Exhibit 51 a letter on the stationery of Twentieth Century-Fox Film Corporation, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, dated November 4, 1949, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 2 in which you request a first-run showing of our feature pictures in your client's Crest Theatre, Baltimore.

"We have given and are giving considerable thought to the selection of first-run outlets for our pictures in cities like Baltimore and it our present thinking that permitting our better pictures to play first-run in a [282] suburban theatre in Baltimore is detrimental to the best interests of our company. We believe in serving as first run in a city like Baltimore a theatre which is in the central zone of a downtown area of the city, in the shopping zone where the stores are located, which is the center of trade and, in our experience, the center of amusement. We find that those people who come into the downtown area of a city come because they have business interests there, to shop, to look around, to go to restaurants and to seek entertainment.

"While your suggestion for experimenting with such

a run on one or two pictures may present a certain appearance of reasonableness, an unsuccessful experiment of that type might prove extremely damaging to us. The first-run of an important picture in Baltimore not only may affect the public reaction to the picture in that entire area but the results are often carefully scrutinized by exhibitors in other areas. Each of our pictures represents a substantial investment in a rather fragile product so that an unsuccessful experiment of the type you suggest might well do our company substantial irreparable damage.

"I trust that further consideration of our problems will convince you that we cannot agree that the method of distribution which we have found to be successful [283] for many years can be suddenly departed from in this city.

"Kindest regards.

"Sincerely,

"(Sgd) A. W. Smith, Jr."

(Letter, November 4, 1949, A. W. Smith, Jr., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 51.)

Mr. Rome:—Sir, I offer in evidence as Plaintiff's Exhibit 52 a copy of a letter dated November 9, 1949, from me to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation:

"Dear Mr. Smith:

"Thank you very much for your letter of November 4th which we have read with great interest.

"While our opinions differ we can understand your view concerning the advisability of serving a downtown theatre with your first run pictures rather than a suburban theatre. There is, however, another approach to this problem which we think is equally valid and, indeed, a necessary result of the logic of your own thought. Even if we assume your view to be correct that the downtown



theatre is a more profitable outlet for your company than the suburban theatre in the event one plays a picture first run to the exclusion of the other, we believe that it must necessarily follow that a day and date policy of the two theatres together can mean only a still greater revenue for [284] the distributor.

"We have always been impressed by your testimony in the Bordonaro case that, generally speaking, you would rather have two outlets than one. Although the circumstances in Baltimore differ from those in Olean, we firmly believe that the fundamental wisdom of your statement is equally applicable and indisputable. Simply as a matter of business policy it cannot be questioned that your company, or any other distributor, stands to receive a much greater film rental from two first-run houses than from one. This is particularly true when, as in Baltimore, the two theatres are sufficiently far apart not to encroach on each other's patronage.

"This must be the thought behind some of the recent distribution policies of your company in the Philadelphia area. It must be the explanation for the fact that in Washington, Roanoke, Kansas City and other cities, according to our information, theatres located in a so-called suburban area are playing day and date with downtown first run houses. We note too that this issue has arisen in certain pending litigation.

"The spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, the fact that suburban areas are frequently themselves cities within metropolitan boundaries [285] with their own business and shopping and entertainment centers, all emphasize and substantiate the basic soundness of a day and date policy.

"We can appreciate your disinclination to experiment on an exclusive first run basis because of the possibility of risk outlined in your letter. We suggest, however, that the risk would not be present if you were to experiment with a day and date policy at the Crest.

"We feel that your letter has expressed a genuine interest in the problem involved and we are sure that you will give this new proposal full consideration. We repeat that our client stands ready to negotiate competitively and to offer any reasonable guarantees you deem appropriate."

(Copy of letter, November 9, 1949, Edwin P. Rome to Mr. A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 52.)

Mr. Rome:—Sir, I offer in evidence as Plaintiff's Exhibit 53 a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 14, 1949, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 9 regarding your client's Crest Theatre, Baltimore, Maryland.

[286] "We have studied the Baltimore area carefully and have come to the conclusion that it is not a practical distribution policy for us to serve the Crest Theatre day and date with our first run showing of a picture in Baltimore and to the exclusion of other equally fine theatres in the city which might also request such a day and date run. I have read carefully your paragraph regarding the spreading growth of cities and feel that your reasoning along these lines may point to something that will develop in the future. However, to answer your question, our study of Baltimore does not indicate the present need for the move on our part that you request.

"While problems like this are usually governed by the circumstances of their particular locality, since people show a tendency, as you did, to say we ought to do in one place what we have done elsewhere this gets us into the practical problem of prints. Our analysis of print costs and returns indicates that we cannot economically buy

more than our present number of prints, and we could not go into the kind of operation you suggest generally without the employment of many additional prints.

"Your information regarding situations where suburban theatres play day and date with first runs is incorrect insofar as Washington is concerned. In Roanoke we have from time to time served more than one theatre first [287] run day and date, but we have considered that a special procedure necessary to protect our first run revenue in that situation. In Kansas City the theatres are operated by our own subsidiaries, and we have felt that we had greater room for experiment when we were showing our own pictures in our own theatres.

"Answering that paragraph in your letter where you refer to my testimony in the Bordonaro case, it is my recollection that when I said I would rather have two outlets than one, I referred to having two opportunities for a first run in Olean and not to the desirability of serving two theatres day and date.

"With kindest regards,

"Sincerely,

"(Sgd) Andy  
A. W. Smith, Jr."

(Letter, November 14, 1949, A. W. Smith, Jr., to Mr. Edwin P. Rome, was marked Plaintiff's Exhibit No. 53.)

MR. ROME:—Sir, I offer in evidence as Plaintiff's Exhibit 54 a copy of a letter dated December 13, 1949, addressed to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation.

"Dear Mr. Smith:

"Please forgive our delay in replying further to your letter of November 14th concerning the Crest Theatre, in Baltimore, but we have been giving the entire situation [288] further detailed study.

"Your letter would seem to indicate some misunder-



standing of our proposal since we are not requesting a day and date run at the Crest 'to the exclusion of other equally fine theatres in the city which might also request such a day and date run'. We do not know that any other theatre has made such a request but, of course, our client would be glad to meet that competition if and when it arises. From the point of view of the distributor, however, such a situation would provide only a still greater revenue and would be in accord with Fox's recent policies as we understand them.

"You mention that our request raises the practical problem of prints. In this connection, we have been much interested in the reports published in the trade papers concerning your recent speech in New Orleans announcing that Fox is intending to increase the number of prints available. It was our belief, however, that the matter of prints became a problem only on subsequent runs not on first run since even if our request were to be granted it would mean only a second print for Baltimore. Moreover, are we not correct in believing that the number of prints is not a real problem in Baltimore which plays pictures very early and hence at a time when there are sufficient prints available? And, if we are correct on the profitable nature of [289] the day and date policy would that not amply compensate any possible increased cost involved for a print?

"You say our information about Washington having a suburban theatre which plays first run pictures is incorrect but that is the information submitted by affidavit in the Meiselman case. Passing that, however, there remain the other cities in the country such as Los Angeles and Denver and Kansas City where, according to our information, our proposal has actually been in operation for some time. It has, undoubtedly, been successful in those cities since otherwise the policy would not be pursued. That being so, there must then be some other reason for refusing to adopt it in Baltimore which is, perhaps, even more suitable for it.

"The ultimate test for the suitability of a theatre is, from the distribution point of view, the ability to produce and pay film rental. The confidence of our client in the grossing potentialities of the Crest is evidenced by the willingness and capacity to pay the most substantial rentals, accompanied by guarantees in the form of certified checks if need be, in order to license your product. Since this is the case how then does Fox run a risk by adopting the day and date policy? In all good faith, we do not see anything in your letters which answers this thought.

"Further in this connection we think that to re-[290] fuse the Crest the opportunity to play day and date with the downtown first run theatres and to insist upon a clearance in favor of those theatres is to act counter to the ruling of the United States Supreme Court which enjoins the granting of any clearance between theatres not in substantial competition. It is our view that the distance between the Crest and the downtown first run houses is such as to preclude their being in substantial competition and to permit their playing day and date.

"Permit us to repeat that the film rentals our client is prepared to pay, with guaranteed minimums, are such as to invite further consideration of our proposal."

(Copy of letter, December 13, 1949, Edwin P. Rome to A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 54.)

Q. (By Mr. Rome):—Mr. Myerberg, in the letter read from Mr. Smith, he refers to the fact that a plan of playing pictures first run in the Crest, which you had been seeking to have adopted, would have excluded the playing of similar pictures first run in other equally fine theatres in the area. Was that ever your intention?

A. No, sir.

Q. Did you ever express such a thought in any way to any person representing any one of the distributor companies?

A. No, sir.

Q. What was the thought that you did express to the [291] companies with regard to the licensing of first-run pictures in the Crest Theatre?

A. That there was a certain competitive area that we considered the Crest to be in. Outside of that area, they could license as many houses as they desired, on first-run. Inside the area, if they felt, if the exhibitors felt they wanted an opportunity to license that picture, they had an equal opportunity that we had, and we would have to enter into competitive negotiations for a picture, and were willing to take our chances on that basis.

Q. Did you discuss with any representative of the distributors what various theatres might enter into such a policy in the city of Baltimore?

A. There was only one detailed discussion about it, and that was with Mr. Contee.

Q. Of what company?

A. Twentieth Century-Fox. He told me he was making an analysis of the first-run situation in the city, and generally investigating multiple first-runs in the city of Baltimore; that is, pictures playing a downtown area at the same time as other theatres in the outlying sections, and that he had picked out several theatres, of which the Crest was one, to do this thing, and he was thoroughly convinced to a mathematical certainty, as he claimed, that Fox Films could get more money for their product in the [292] city of Baltimore out of four or five day and date runs of their pictures in the city than they were then enjoying with first-run and subsequent-runs, and that they would still have the subsequent-run business to run throughout the city; and that was the way he intended to present it to his people.

And, pursuant to that, Mr. Minsky, who was then division manager of Twentieth Century-Fox, visited my theatre to go into the matter, and they mentioned several theatres, such as the Edmondson Village, which I think



just opened or had been opened a couple months, and the new Northway Theatre, which was being built.

**Q. Northwood Theatre?**

**A. The Northwood Theatre.** And he mentioned a theatre in Dundalk as a possibility, and a theatre in the Brooklyn area, and the Victory Theatre in Brooklyn as being a possibility. Not Mr. Minsky—Mr. Minsky, in fact, as I recall, at that time had even tentatively selected a picture, the picture I don't recall. That was the only time I think of, where they went into the distributors, the possibility of other theatres playing it in other areas, and on what basis or at what theatres they would play it.

**Q. When you say, Mr. Myerberg, that the city would be divided into areas, would you explain that, so the Court and jury may understand just what the thought was that was discussed with Mr. Contee at that time?**

[293] **A. Well,** the area surrounding Edmondson Village would come east to approximately Gwynns Falls Parkway, and north, west and south, covering Cronsosville, and the Edmondson Village area, all over to Frederick Road, and from Gwynns Falls Parkway, taking a line there from Park Circle to Gwynns Falls Parkway, and from Gwynns Falls Parkway north, from Park Circle to the east, toward Roland Avenue, and to line that north, winding up somewhere around somewhere Reisterstown, inasmuch as there were not any first-class theatres, except one small theatre in Reisterstown.

[294] **Q. Was it intended that only theatres in any one of those particular areas would have access to pictures on first-run?**

**A. Well,** it was Mr. Contee who thought that only one theatre would have access to pictures in those areas besides the downtown area. Of course, the downtown area would also play the picture day and date with two or three theatres in different particular areas.

**Q. What if it occurred that more than one of the theatres in one of these areas wanted first run?**

A. There would have to be negotiations in that area.

Q. Nothing, however, came of the suggestion that had been made to Mr. Contee?

A. No, I had discussed with Mr. Contee several times in Washington and several times in Baltimore, but after I had continuously asked him what happened to the policy he said that finally New York vetoed it and I can't do anything with it, and that ended it there.

Q. Was there any reason given by Mr. Contee why that suggestion was rejected?

A. Mr. Contee said he could not understand why it was rejected, that New York made the decisions, and that was the only thing he had to go by.

MR. ROME:—If the Court please, I offer in evidence as Plaintiff's exhibit No. 55 a copy of a letter dated April [295] 6, 1951 from Mr. A. W. Smith, Jr., of Fox, addressed to Mr. Al Lichtman, Cincinnati.

"Dear Al:

"We have been having great difficulty in getting our pictures dated first-run City of Cincinnati and greater difficulty making deals with the subsequent run theatres.

"Maurie White is our customer in Cincinnati and he is a motivating influence in an exhibitor group which, apparently, has banded together to keep down film rentals.

"After much discussion, we have taken the following action:

"We have sold a number of pictures to play first-run City of Cincinnati day and date at the following theatres:

"The Twin Drive-In

"The Valley Theatre

"The Theatre in Covedale

"The Theatre in Covington, Kentucky

"The Mariemount Theatre

"The Cox Theatre

"These six theatres, or at least five of them, will play the pictures first-run and with a 21-day clearance

over subsequent runs. The owners of these theatres are the leading members of Maurie White's buying and booking group and we have assurance that with the action we have taken we will secure satisfactory subsequent run business.

[296] "The following pictures have been dated:

"April 25th	FOLLOW THE SUN
"May 2nd	I CAN GET IT FOR YOU WHOLESALE
"May 9th	MONTE CRISTO AND NICK CAIN (Equal billing)
"May 16th	FOURTEEN HOURS
"May 23rd	YOU'RE IN THE NAVY NOW
"May 30th	ON THE RIVIERA
"June 6th	RAWHIDE
"June 13th	HALF ANGEL
"June 20th	TELEGRAPH HILL
"June 27th	THE GUY WHO CAME BACK

"So as not to eliminate Maurie White entirely and so that he may have a chance to go along with us, our arrangement permits of his playing one of his first-run downtown theatres day and date with these other theatres. He probably will not do so, but he is being given the opportunity.

"Maurie White will probably contact Bill Gehring and perhaps you and Mr. Skouras. Therefore, I am giving you this information so you will know our story.

"(Sgd) A. W. Smith, Jr."

With a carbon copy to Mr. W. C. Gehring.

THE CLERK:—Plaintiff's exhibit No. 55.

[297] (Copy of letter April 6, 1951 Smith to Lichtman, was marked Plaintiff's Exhibit No. 55.)

MR. ROME:—Mr. Raftery, may I call upon you for letters from Mr. R. E. Moon to Mr. A. W. Smith, Jr., dated April 6, 1951, regarding Cincinnati?



If the Court please, I offer in evidence as plaintiff's exhibit No. 56 copy of a letter on the stationery of Twentieth Century-Fox Film Corporation, office of R. E. Moon, Central Sales Manager, Chicago, Cincinnati, Cleveland, Detroit, Indianapolis, dated April 6, 1951 to Mr. A. W. Smith Jr., New York, New York.

"Dear Andy:

"We have arranged to sell our pictures first-run Cincinnati on a non-exclusive basis to the following theatres:—Twin Drive-In, Valley, Covedale, Covington. We hope to also include one run in the Oakley or Mariemount section of Cincinnati, one at Peebles Corners, the location of the RKO Paramount Theatre and a run downtown.

"We have sold fourteen pictures to the above four theatres, each to play a 7-day run in each theatre, one a week beginning April 25th. Schedule of the bookings and playdates is attached. We have granted a clearance of 21 days.

"The combined advertising budget of the four theatres listed is \$650 per week and we have agreed to split [298] 50/50 over this budget. Terms are 7 days, 35% to a 66 $\frac{2}{3}$ % split. I understand that the above theatres propose to charge an adult admission price of 70 cents and that the admission at the Twin Drive-In Theatre will be 75 cents.

"I will arrange to have an exploitation man, probably Lee Siegel, cover each engagement, and it would certainly be wonderful if we can secure the services of Eddie Solomon right away to line things up and get it rolling.

"Joe Rosen did a great job in lining up these theatres on a first-run basis and it is his considered opinion that we should receive from \$7,500 to \$9,000 film rental on each picture played in these four theatres. Of course, if other theatres are added, then this figure will increase.

"Under this arrangements, we are assured of repre-

sentative terms and will, of course, have a steady flow of releases. We do not anticipate any difficulty marketing our pictures to the balance of the subsequent run possibilities in Cincinnati, with the possible exception of the White Circuit Theatres.

"The sale to the above theatres will include Shorts, News, and March of Time, on a first-run basis.

"Kindest regards.

"Very truly yours,

"(Sdg) Ray

"R. E. Moon."

With a copy to Mr. J. Rosen. There is attached, members of [299] the jury, a list of pictures and their dates.

THE CLERK:—Plaintiff's exhibit 56.

(Copy of letter, April 6, 1951, Moon to Smith, was marked Plaintiff's Exhibit No. 56.)

[301] Mr. ROSEN:—If the court please, I want to offer in evidence, as plaintiff's exhibit No. 57, a copy of an Inter-Office correspondence or note on the stationery of Twentieth Century-Fox Film Corporation, dated April 13, 1951, to Mr. H. B. Johnson, from W. C. Gehring, reading as follows:

"Note the attached which Andy Smith wrote to Al Lichtman telling him of the decision we have made regarding the distribution of our pictures 1st run Cincinnati.

"Mr. Lichtman has asked me to have you give thought to the subject outlined in Mr. Smith's letter and advise me please if you find a legal problem involved.

"Will you please return the attachment."

Mr. ROSEN:—I think we can stipulate that the attachment indicated was a copy of the letter which has already been offered and read in evidence.

(Letter, April 13, 1951, W. C. Gehring to H. B. Johnson, was marked plaintiff's exhibit No. 57.)

MR. RAPTERY:—And Johnson is their lawyer.

MR. ROMB:—Johnson is a member of the legal staff of Twentieth Century-Fox.

I offer in evidence, as plaintiff's exhibit No. 58, a copy of a memo, dated April 16, 1951, signed "H. B. J.", [302] presumably Mr. Johnson, to Mr. W. C. Gehring. "Re: CINCINNATI.

"As requested, I have examined Mr. Smith's memo to Mr. Lichtman of April 6th, 1951. Speaking generally, I see no legal objection to the playing policy outlined therein. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination.

"There are two dangers to a radical change in policy of this type:

"1—Such a change is liable to prove so irritating to some exhibitors who liked the previous system better that he may bring an antitrust suit based upon some alleged past wrong.

"2—The existence of such a policy in Cincinnati will enable people to who would like to see a similar policy in some other town to use Cincinnati as a precedent against us.

"There are also at least two legal advantages to the proposed change in policy:

"1—There was considerable danger of litigation from the operator of the Twin Drive-In Theatre if that theatre were not afforded an opportunity to negotiate for first run pictures.

[303] "2—There was considerable danger of litigation on behalf of some of the subsequent run operators in Cincinnati who were claiming that the previous clearance given to first run was too long.

"It is my opinion, based on the correspondence I have seen relating to Cincinnati, that the change pro-



posed will lessen rather than increase the danger of anti-trust litigation against Twentieth Century-Fox in Cincinnati.

"H. B. J."

(Copy of memo. April 16, 1951, H. B. Johnson to W. C. Gehring, was marked Plaintiff's Exhibit No. 58.)

[312] MR. RAFTERY:—Mr. Rome has asked me to stipulate that on November 2, 1949, he sent the same letter to RKO Radio Pictures, that he read to the jury. I think you have read two or three of them, that you wrote all the companies about that time on behalf of Theatre Enterprises, Inc., and with the approval of Theatre Enterprises, Inc., a letter similar to Exhibit 50; and we will waive the necessity of his rereading to the jury the same story that he read several times before.

THE COURT:—Very well.

[313] MR. RAFTERY:—You are going to have it marked?

MR. ROME:—Yes. This is a copy of a letter from me to the RKO Radio Pictures Inc., written on behalf of Theatre Enterprises, Inc.

(Copy of letter, November 2, 1949, Edwin P. Rome to RKO Radio Pictures Inc., was marked Plaintiff's Exhibit No. 62.)

MR. ROME:—I should like to offer, as Plaintiff's Exhibit 63, a letter from RKO Radio Pictures Inc., New York City, on stationery of the Legal Department, the letter being dated November 23, 1949, addressed to me, "Re: Crest Theatre, Baltimore."

"Dear Mr. Rome:

"We have your letter of November 2nd. It is our view that in large cities such as Baltimore the most satisfactory method of exploiting and marketing our pictures is achieved by licensing their first-run exhibitions to theatres located in the downtown area.

"Our investigation of the Crest Theatre and its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre. In our judgment the Crest Theatre, however glowingly described, is, in the final analysis, a neighborhood theatre. We have been furnishing pictures to the Crest Theatre on first [314] neighborhood run, which is the availability we consider appropriate to that theatre.

"Very truly yours,

"(Sgd) William Zimmerman"

(Letter, November 23, 1949, from William Zimmerman, of RKO Radio Pictures Inc., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 63.)

[315] Mr. Rome:—Mr. Raftery, may I call upon you for a letter from Mr. Zimmerman to Mr. Seymour Simon, re Crest Theatre, Wichita, Kansas, dated April 17, 1950, and also a letter from Mr. Zimmerman to Mr. H. H. Hunt, concerning the Tower Theatre, Wichita, dated April 18, 1950?

Mr. Raftery:—I don't know whether we are getting far afield or not. We are across the Mississippi to Wichita, and I do not want to be captious about it. Mind you, this is one lawyer writing another lawyer.

Mr. Rome:—This is correspondence coming from the defendants themselves, sir, and designed, we believe, to show the jury and Your Honor, sir, the nationwide pattern of this situation, the intent, motive and knowledge of these defendants with regard to the situation when a theatre located outside of the downtown area calls for access to first-run product.

The Court:—Very well.

Mr. Raftery:—We have to find them first. What are the dates?

Mr. Rome:—April 17 and 18, 1950.

If the Court please, I offer in evidence as Plaintiff's

exhibit No. 64 a letter dated April 17, 1950, addressed to Mr. Seymour Simon, 29 South LaSalle Street, Chicago, Illinois, re Crest Theatre, Wichita, Kansas.

[316] "Dear Mr. Simon:

"As I explained to you, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theatres in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Crest Theatre is appropriate for that neighborhood theatre.

"However, in an effort to avoid litigation between us, we have decided to afford your client's Crest Theatre and the competitive Tower Theatre an opportunity to obtain our pictures on an exclusive first-run in the City of Wichita. This opportunity is being afforded the Crest and Tower Theatres on an experimental basis and these theatres will be competing for our pictures first-run against the theatres in the downtown area.

"We, of course, reserve the right to discontinue this procedure if and when experience has, in our judgment, demonstrated that a discontinuance is desirable.

"Sincerely,

"(Sgd) William Zimmerman."

Carbon copies to Mochrie, Branson, Timberlake, Kolitz, Lewis, Loventhal.

MR. RAFTERY:—Now, if Your Honor please, I move to strike from the record the remarks made by counsel before— [317] I did not raise the objection, but when we were discussing this proposition he says "I am showing part of the national" something or other, where it says just the opposite, where they gave the neighborhood theatre the right to bid first-run to avoid litigation.

MR. ROME:—On the contrary, I believe that within the next few minutes I will be able to show the reason it was



done in Wichita, Kansas, which is because Fox Theatre owned a theatre and was discriminating as against the independents in that area.

MR. RASTERY:—Oh, no.

MR. ROME:—I submit, sir, that we are entitled to ask the jury to infer from that situation the fact these people do it in situations where they have their own theatres in a suburban area, that they have access to the product.

THE COURT:—Go ahead.

THE CLERK:—Plaintiff's exhibit No. 64.

(Copy of letter, April 17, 1950, Wm. Zimmerman to Seymour Simon, was marked Plaintiff's Exhibit No. 64.)

MR. ROME:—I offer in evidence as plaintiff's exhibit No. 65 a copy of a letter dated April 18, 1950, copy to Mochrie, Branson, Timberlake, Kolitz, Lewis, and Loventhal, to Mr. H. H. Hunt, Hunt & Chase Theatres, Cincinnati, Ohio, re Tower Theatre, Wichita, Kansas.

[318] "Dear Sir:

"With regard to your letter of January 4, 1950, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theatres in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Tower Theater is appropriate for that neighborhood theatre.

"We have decided to afford you and the competitive Crest Theatre an opportunity to obtain our pictures on an exclusive first-run in the city of Wichita. This opportunity is being afforded the Tower and Crest Theatre on an experimental basis and your theatre will be competing for our pictures first run against the Crest Theatre and the theatres in the downtown area. We, of course, reserve the right to discontinue this procedure if and when

experience has, in our judgment, demonstrated that discontinuance is desirable.

"Very truly yours,

"RKO Radio Pictures, Inc.

"(Sgd) William Zimmerman"

THE CLERK:—Plaintiff's Exhibit No. 65.

(Copy of letter, April 18, 1950, Wm. Zimmerman to H. H. Hunt, was marked Plaintiff's Exhibit No. 65.)

MR. ROMA:—Now, sir, I would like to offer in evidence as plaintiff's exhibit No. 66 a copy of a letter—

[319] MR. RAFTERY:—Is this the one you say refutes something, or is that the only one you put in?

If your Honor please, I now move to strike any exhibits—I am perfectly willing they stay in—the remarks made where Your Honor refused to strike the first remark. Now, the letter he puts in reaffirms exactly what is in the other letter. RKO opened its—

THE COURT:—Counsel, they are not marked in evidence.

MR. RAFTERY:—I know they are not, but he is consistently making statements that are absolutely misleading.

MR. ROMA:—On the contrary, sir, I am attempting in answer to Mr. Rafterys' statement, to give to the Court the reasons we are introducing these letters, and I can only say that, sir, as each letter comes along in turn—

THE COURT:—Go ahead.

MR. ROMA:—Thank you, sir.

I offer in evidence, sir, as plaintiff's exhibit No. 66 a copy of a letter dated December 13, 1948 addressed to Mr. Harry R. Hamburg, Kansas City branch office.

This, members of the jury, was a Paramount letter. The letter concerned Tower Theatre, Wichita, Kansas.

"Dear Harry:

"I discussed with Mr. Smith by telephone on December 8, 1948, the request for an opportunity to negotiate

for a day and date first-run against the Fox Boulevard Theatre [320] which was contained in Mr. Hunt's letter of December 4, 1948, a copy of which was received by us here in New York.

"Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity.

"I am enclosing herewith draft of a letter which I suggest be sent over your signature to Mr. Hunt and which you will list such pictures as have not already been licensed for exhibition first-run in Wichita and which have been trade-shown.

"You will send a similar letter to Fox Midwest leaving out the introductory matter in the draft of the letter to Mr. Hunt and merely state that a request has been received from the operator of the Tower Theatre to negotiate competitively for this run and that we are offering them an opportunity to submit offers in respect to the same pictures.

"You will also, of course, want to indicate in the letter which you send to both exhibitors the final date which you will set for the receipt of offers in respect to any of the pictures which they may desire to exhibit. You will affix this date also on a self-addressed envelope to be enclosed with each letter and the answers will be retained after their receipt until the dates given as the [321] final date, at which time they will be opened and considered.

"Kindest personal regards.

"Very truly yours,

"(Sgd) Richard P. Morgan."

With carbon copies marked going to Messrs. G. A. Smith and H. Wirthwein.

"P.S. Since dictating this letter several days ago, a re-reading of it indicates to me that the first paragraph



on page 2 of the draft of the letter to Mr. Hunt should, of course, be left out on the copy which you send to Fox Midwest. As a matter of fact, the paragraph is probably misplaced and should be the concluding paragraph in the letter.

"If you have any questions in regard to the procedure in handling this matter, I suggest you call me."

Will you stipulate, Mr. Raftery, that Richard P. Morgan, who sent this letter, was a member of the legal staff of Paramount?

MR. RAFTERY:—Yes, he was a lawyer for Paramount at that time, surely.

MR. ROME:—There is attached, members of the jury, to Mr. Morgan's letter to Mr. Hamburg, a draft of a letter being addressed to Mr. Herman H. Hunt, offering him the opportunity to bid for Paramount pictures on an experimental [322] basis.

THE CLERK:—Plaintiff's exhibit 66.

(Copy of letter, December 13, 1948, Richard P. Morgan to Harry R. Hamburg, was marked Plaintiff's Exhibit No. 66.)

MR. ROME:—With the permission of the Court, I would like to read to the jury, if I may, sir, the answer of Fox to plaintiff's interrogatory No. 7, the interrogatory being a request for the reasons why Fox refuses to license pictures on first-run to the Crest Theatre.

The answer of Twentieth Century-Fox Corporation to that question, members of the jury, was as follows:

"For over 20 years Twentieth Century-Fox Film Corporation and its predecessor in name, Fox Film Corporation, has licensed most of its pictures on first run in the City of Baltimore to the New theatre, operated by an independent exhibitor named Morris A. Meehanic. The New theatre is located in downtown Baltimore in the heart of the business and amusement section of the city. Its drawing power is not limited geographically to a definite neigh-

borhood, but extends over the entire city of Baltimore and nearby towns.

"For over 20 years the New theatre has been known as the home of Twentieth Century-Fox pictures. Mr. Mechanic operates only the New theatre as a first run theatre. He is not affiliated with any circuit of theatres or any booking and buying combine.

[323] "For many years Twentieth Century-Fox Corporation has had in the New theatre virtually an exclusive first run show case for its pictures in Baltimore. In fact, Mr. Mechanic operates the New theatre exclusively on Twentieth Century-Fox pictures. In the New theatre, Twentieth Century-Fox Film Corporation has the finest show case for its pictures in Baltimore. Twentieth Century-Fox pictures of high quality ~~are~~ always given preferred playing time at the New theatre and receive long runs. This is possible because of the fact that Mr. Mechanic operates exclusively as an exhibitor of Twentieth Century-Fox pictures. Mr. Mechanic exploits the pictures to the fullest extent.

"Since a substantial part of the revenue of Twentieth Century-Fox Film Corporation in the City of Baltimore is derived from the first run exhibition of its pictures, it is of the utmost importance that first run pictures receive the longest possible playing time with the greatest possible exploitation. A long playing time and proper exploitation not only rebounds to the benefit of Twentieth Century-Fox Film Corporation on the first run exhibition but also in the subsequent run exhibitions. Word-of-mouth advertising by those who have seen a first run picture at a downtown theatre is of incalculable value when a picture is shown on subsequent runs.

"A neighborhood theatre such as the Crest, catering [324] to its own neighborhood and in intense competition with other nearby theatres, could not hope to exhibit a picture as long as the New theatre. Some pictures are exhibited at the New for four or five weeks and most are exhibited for two or three weeks. The revenue to be de-

rived from a first run exhibition at a subsequent run theatre such as the Crest, could not compare with what would be received from exhibition at the New theatre. A neighborhood theatre does not and can not have the matinee patronage that a downtown theatre has.

"Plaintiff's request to license Twentieth Century-Fox pictures on first run was given careful consideration by this defendant. The decision not to license the Crest theatre on first run in Baltimore was based upon the experience of the Company and the experience of its sales personnel. That decision was arrived at independently and without consultation with any other defendant in this action. It is the opinion of Twentieth Century-Fox Film Corporation that the decision is based upon sound business reasons. Plaintiff's allegation that Twentieth Century-Fox Corporation refused to license its pictures to the Crest theatre on first run because of a conspiracy among the defendants is not true."

Q. (By Mr. Rome):—Now, Mr. Myerberg, in the answer of Twentieth Century-Fox Film Corporation it is stated that the Crest Theatre could not hope to exhibit a picture as long as the New Theatre, that pictures are exhibited at the New [325] for four or five weeks and most are exhibited for two or three weeks.

Did you have any discussions with representatives of Fox or any other company with regard to the length of time you would be able to play a picture first-run in the Crest Theatre?

A. Yes, and I think in my letter of October 12, 1948 they requested me to send to them, I outlined the fact that the picture cannot be pulled or taken out until the gross of that picture had reached a gross that would be mutually agreed upon. In plain words, if we set the figure at \$7,000 or \$8,000 or \$6,000, before we could take a picture out, that we should agree with them what that figure should be.

Q. And the picture would play until the gross received at the box office had reached that figure; is that correct?



A. That is correct. As long as it was more than that figure, we continued to play. And we continued to explain to them further that although we had expenses for a second-run theatre that were prohibitive for a second-run theatre, as a first-run theatre our standing expenses were such that we could play a picture for a much longer period than downtown, because we did not need as much gross to break even.

Q. What was the actual operating expense per week of your theatre, Mr. Myerberg?

A. Under a first-run policy we had a projected statement [326] at that time of around \$2,400 or \$2,500 a week without film.

Q. Without having to pay film rental for the pictures as shown in your theatre?

A. Yes, sir.

Q. And what did your operating expenses prove to be when you ran your theatre on the first subsequent run policy?

A. Between \$1,800 and \$1,900.

Q. Per week?

A. Per week, without film.

Q. The Fox answer, Mr. Myerberg, also refers to the fact that a neighborhood theatre cannot and does not have the matinee patronage that a downtown theatre has. What has been the experience of the Crest Theatre with regard to that question of matinee patronage?

A. Well, we do not claim any great matinee patronage for the Crest Theatre. We agree that the matinee downtown patronage would be greater than the Crest patronage. Nighttime patronage of the Crest Theatre would be considerably greater than the downtown theatres, and that is the time when you get the most money out of your box office. That is when the receipts would be greater.

You go back to drive-in theatres in Cincinnati, and those theatres only operate after it gets dark, they have no matinees at all.

MR. RAFFERTY:—I presume this is being received only [327] as an opinion of this witness and not as evidence.

THE COURT:—Yes, he is giving evidence. Do you know that to be a fact?

THE WITNESS:—Yes, sir.

Q. (By MR. ROME):—Is it known in the industry, Mr. Myerberg, that a drive-in theatre only operates in hours of darkness?

MR. RAFFERTY:—That is a point we all know, whether we are in industry or not.

THE WITNESS:—Yes, sir.

Q. (By MR. ROME):—Mr. Myerberg, what is generally considered to be the best movie day of the movie week?

A. Sunday.

Q. And what is the experience in the industry with regard to matinee patronage on Sundays?

A. Very good.

Q. What is generally considered to be the worst week in the movie year?

A. I would say the week before Christmas.

Q. Is there any reason generally accepted in the motion picture business for that?

A. Yes, although there is a tremendous number of people downtown, they are all, of course, in a buying mood and not many going to theatres.

Q. Mr. Myerberg, can you please identify what this [328] large map represents?

A. I cannot see it very well from here.

Q. With the Court's permission, I will have you come over here.

A. This map represents the relative position of the Crest Theatre to the downtown first-run theatres in the center of the city. It also represents a one mile radius and the population within this one mile radius. It also represents the areas I described before, from Gwynn's Falls Parkway to Druid Park Drive and Roland Avenue to the county line and out in the county to comprise the section

we think the Crest Theatre draws from. And it would be in substance competitive to any theatre in that area.

We have shown those theatres in that area to which we are in substantial competition.

Now, in the downtown area there is located the Stanley, Mayfair, Century, and on top of the Century is the Valencia. We have the Town and Hippodrome and Parkway Theatre on North Avenue. In the first mile of population surrounding those theatres we have 117,311 people. In the second mile radius, but only between the first and the second mile, there is a total of 307,020 people. In the third mile radius between the second and the third mile, there are 228,401 people, giving a total population in the three-mile radius from these downtown theatres of 600 and some odd [329] thousand, I think it is 622,000 people. It shows the relative position of that 3-mile radius, that that does not come within our area, that we are not in substantial competition.

Q. What theatres are shown to be in the area of the Crest Theatre?

A. Yes. In the area of the Crest Theatre we have the Pimlico, the Uptown, the Avalon, the Gwynn, the Ambassador, the Forest, and on this map we do not have the county, so we do not have the Pike's Theatre in Pikesville.

Q. How far away is the Pimlico Theatre and the Uptown Theatre from the Crest?

A. Approximately one mile.

Q. And the Avalon Theatre from the Crest?

A. Approximately one and one-half miles.

Q. How far is the Crest from the Ambassador?

A. About a mile and three quarters.

Q. And the Gwynn is directly across the street from the Ambassador?

A. Directly across the street from the Ambassador.

Q. And the Forest Theatre from the Crest is how far?

A. About two and one-quarter miles.

Q. On the first subsequent run of product that you



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have been playing in the Crest Theatre, Mr. Myerberg, what theatres have been playing day and date?

[330] A. Playing day and date with the Uptown, with the Avalon, and the Ambassador, and sometimes the Forest.

Q. That was because the distributor companies believed you were not in substantial competition with those theatres; is that correct?

A. Yes, sir; but that will show up better from this map here (indicating).

Q. On the other hand, the companies took the view, did they, that you were in substantial competition with the theatres located downtown?

A. Yes, sir.

Q. How far away are you from the nearest downtown theatre at the Crest?

A. Very close to six miles from the Stanley Theatre to the Crest, the closest theatre.

. . . . .  
[334] Q. (By Mr. Rome):—Mr. Myerberg, what is this smaller map which has been placed on the stand?

A. This is to show the mile radius of the Crest Theatre, using the Crest Theatre as the point of radius, and showing a one-mile radius from the Crest Theatre in our drawing area. It also shows, in the corner, a 3-mile circle from the center of the city relative to the position that has to the outside perimeter of our draw and our area. It shows the new units built in the area from 1949, 1950, and 1951, it shows the approximate increase in the city population during 1950 and 1951, and it shows the county population of 1950 and 1951 and also the increase in the county new housing units built in the county area.

Q. When you refer to new units built in the area, [335] you mean new housing units?

A. New housing units.

Q. How are they shown on this map?

A. They are shown on the map, in the city, with the blue areas. In the county, this was information from the Bureau of Buildings in Baltimore City, and in the county they did not have the exact locations of the different new developments. They had the number in each district; and we have placed that in the district indiscriminately. We did not have the exact locations.

Q. Each one of these blue marks noted on the map refers to how many units of housing?

A. Twenty or more, 20 up to 3 or 4 or 5 hundred.

Q. And you do not show on this map the number of new housing units that have gone up, in which there are fewer than 20 houses?

A. No, sir; we haven't taken into consideration, at all, single-family units, single houses built by private people, or houses built by any contractor that was under 20 in number.

Q. What does the yellow line indicate on the map?

A. This is the city boundary line.

Q. What is found to be the population in the area drawn upon by the Crest Theatre, as you have described it?

A. About 125,000 people.

[336] Q. As of what date is that, Mr. Myerberg?

A. That would be as of 1951.

Q. Have you any knowledge of the number of people who lived in that area, at the earlier date, 1948 and 1949, when your theatre was first built and opened?

A. Yes; we have taken the number of new units built in the area in 1949, 1950 and 1951, and taken what is conceded by everyone to be 3.6 people per housing unit in Baltimore, and we have used that in this area of Baltimore, and we have used that, multiplying the number of units, and we come to the fact that the population has an increase of about 10,000. That is only supposed to be approximate; that is not supposed to be exact.



Q. What do your figures reveal with regard to the amount of new housing that has gone up in that area; what has been the extent of that new housing?

A. In the city, in 1949, there were 372 new units in the city area, in here.

Q. In the city area encompassed within the area drawn upon by the Crest Theatre?

A. That is right. And in 1950 we had 605 new housing units, and in 1951, 846. Now, in the county, in 1949, we had 947 in the different areas, in the different circles of population drawn-on by the Crest Theatre. In 1950, we had 1,765 in this area located outside of the city of [337] Baltimore, and in 1951, 1,152, giving us a total in population increase, or population in this area here, of 22,604.

Q. And, each time you used the word "units", you are speaking in terms of housing projects of 20 or more houses?

A. Yes, sir.

Q. What theatres are shown on this map, Mr. Myerberg, with reference to the Crest Theatre?

A. We have the Crest Theatre here, and here is the Pimlico, the Uptown, and the Avalon; over here, the Forest, and Ambassador, and Gwynn, and the Pike.

Q. And how far out do you consider that the Crest Theatre draws for its patronage into the county area?

A. We go out into the fourth district, to Reisterstown, to Reisterstown, located out there, in which there is a small theatre, I think, some three or four hundred seats.

Q. How many miles away is that from the Crest?

A. About 10 miles.

Q. Is there any reason why you consider that the Crest draws from as far away as 10 miles out into the county?

A. Yes. There is no other theatre there, other than at Pikesville, which is in competition with the Uptown or Crest.

. . . . .

[340] Mr. Rome:—If the Court please, I would like now, if I may, to read to the jury the Answer of Loew's [341] Incorporated, to Plaintiff's Interrogatory No. 7, which asks Loew's why it was that the company refused to license first-run pictures to the Crest Theatre.

This answer, Members of the Jury, from Loew's Incorporated, to that question, is as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre.

"It is the opinion of Loew's Incorporated that neither the Crest Theatre nor any other suburban theatre in Baltimore would be an adequate exclusive first run outlet for any feature motion picture distributed by Loew's Incorporated and that such a first run exhibition of any of its feature motion pictures in any suburban theatre in Baltimore would return much less first run film revenue than would be derived from its first run exhibition in any adequate downtown first run theatre.

"It is the opinion of Loew's Incorporated that either an exclusive or a day and date first run exhibition of any of its feature motion pictures in any suburban [342] theatre in Baltimore would seriously impair the full license revenue which Loew's Incorporated otherwise would obtain from the subsequent run exhibitions of that picture in Baltimore and in the surrounding area.

"Loew's Incorporated indirectly owns 50 percent of the capital stock of Century-Parkway Corporation which operates Loew's Century Theatre and Loew's Valencia Theatre as first run theatres in Baltimore, Maryland. Marcus Loew Booking Agency, Inc., a subsidiary of Loew's, Incorporated, does the buying and booking of

pictures for Loew's Century and Loew's Valencia Theatres and performs other managerial functions for those theatres. Loew's Incorporated regularly exhibits its own feature motion pictures on first run in its own theatre in any city in which it operates a first run theatre.

"It is the opinion of Loew's Incorporated that Loew's Century Theatre, because of its location, seating capacity and other physical characteristics, and management, is the best first run outlet in Baltimore for Loew's feature motion pictures.

"It is the opinion of Loew's Incorporated that Loew's Century Theatre and Loew's Valencia Theatre each is in direct and substantial competition with every other theatre in Baltimore and in the surrounding area, including the plaintiff's Crest Theatre, and that any theatre in [343] Baltimore exhibiting a feature motion picture on its first run in Baltimore is entitled to clearance over every other theatre in the city and in the surrounding area.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for an exclusive first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loew's Incorporated that the location and grossing possibility of the Crest Theatre are not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and over the downtown first run theatres in Baltimore and that therefore it would be discriminatory and unfair to license the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore as well as the downtown first run theatres in Baltimore.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for a day and date first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loew's Incorporated that the location and the grossing possibilities of the Crest Theatre are



not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and that therefore it would be discriminatory and [344] unfair to license the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore.

"For the aforesaid reasons Loew's Incorporated is not willing to license any of its feature motion pictures to the plaintiff for its first run exhibition in Baltimore at the Crest Theatre as demanded by the plaintiff."

Q. (By Mr. Rome):—Mr. Myerberg, during the first 12 months of its operations on the first subsequent run policy what was the gross earned by the Crest Theatre?

. . . . .

[345] THE WITNESS:—\$122,000.

THE COURT:—For what period?

MR. RAFTERY:—Twelve months.

Q. (By Mr. Rome):—That was actually the box office admissions received by the Crest Theatre during that period?

A. Yes; without any miscellaneous income in it.

Q. Do you know, Mr. Myerberg, what film rental was paid by the Crest Theatre to the distributor companies on that gross admission?

A. Around \$45,000.

Q. Has it ever been your thought, Mr. Myerberg, or did you ever request Loew's Incorporated, that you should have an exclusive first-run in your theatre, to the exclusion of any other so-called fine suburban theatres, as described in Loew's answer to the Interrogatory?

A. No, sir.

Q. Have you at all times been willing that other suburban theatres in the city of Baltimore should have equal access to first-run product in the city of Baltimore?

A. Yes, sir.

. . . . .

[353] Q. (By Mr. Rome):—Mr. Myerberg, with regard to the Metro pictures, distributed by Loew's Incorporated, you have already testified that you were not able to get access to first-run pictures from Loew's Incorporated either on an exclusive basis or a day and date basis in Baltimore. Is that correct?

A. Yes, sir.

Q. On what basis were you finally able to license pictures from Loew's Incorporated?

A. On the first subsequent run basis.

. . . . .

[387] Q. One of the reasons that was given to you why the Crest Theatre could not have access to first-run product, either on an exclusive or day and date basis, with downtown, was that your theatre was in substantial competition with the downtown theatres; is that correct, Mr. Myerberg?

[388] A. That was one of the reasons given. The other reasons uniformly given to me was the fact that that was the national policy, that they absolutely would not play these pictures in theatres located out of the downtown area; that they had done it, and I pointed out a few exceptions to the contrary; but those were exceptions to the general rule, and that is their policy, and you could not get it from anybody.

Q. Do you consider your theatre in substantial competition with the first-run theatres located in the downtown area of the city?

A. No, sir.

Q. Why not?

A. Because of distance, mostly. As I stated before, we are between 5½ and 6 miles from the closest downtown theatre.

Another explanation for that, we have gone into this fact rather thoroughly from the time before me built the theatre up to the present time, continuously trying to analyze the situation, and we have come up with one thing,

the fact that the largest grossing theatre downtown is the Century Theatre. Now, on an average—these are averages—on an average, the Century Theatre, as close as we can come to it—and I believe that is fairly close—plays to approximately 20,000 people a week. That means 20,000 [389] paid admissions a week. In Baltimore and Greater Baltimore, the population is 1,300,000, or thereabouts. We take out of that population approximately 275,000 colored people, which gives the Century the possibility of draw from a high of 1,025,000 people, in round figures. Their 20,000 represents two percent of the entire population of the city of Baltimore, and that is the largest grossing house in the city of Baltimore.

Suppose 2 percent that came from our area, or let's say, put it at 50 percent more, that 3 percent came from our area, certainly, that is not substantial competition.

Q. Now, there are how many people located in the area from which the Crest Theatre draws?

A. 125,000.

Q. In your opinion, as a result of your experience in the motion picture industry, is a population of 125,000 people sufficient to support a first-run theatre?

A. More than sufficient.

Q. Is there anything on which you base that?

A. Using the same figures, we would only have to play to approximately 15 percent of our population to almost equal the number of people that go to the Century Theatre. That is 15 percent of our population. And may I add here, that population, with the exception of a couple thousand, is all white.

[390] Q. How do you compare your theatre with the downtown theatres, in so far as suitability for first-run is concerned, Mr. Myerberg?

A. Well, we are a newer theatre, with newer, as I described before, ideas in motion picture design. We have a greater comfort in the seating of the theatre, because of the fact, as I have explained before, the staggered seats



and the spaces between the seats, where your knees are not in contact with the seat in front of you, if you are sitting in an upright posture, of course. The fact of our free parking lot, the fact of our television lounge, and then, although the Stanley and the Century, and probably Keith's, are larger than our theatre, we still have ample size for first-run pictures, or to exhibit first-run pictures, and return a considerable return to ourselves and to the distributors, as great, if not greater than downtown theatres.

**Q.** Does any theatre located downtown offer free parking facilities to its patrons?

**A.** Not to my knowledge; no, sir.

**Q.** What about the suitability of your theatre with regard to its equipment, projection equipment?

**A.** We have the finest projection equipment that is possible to buy, projection and sound. I might add something; the suitability of the theatre is borne out in another respect. We grossed, in the first 12 months of our [391] operation, over \$122,000. That does not include any candy concession business, or any miscellaneous income. That is actual box office receipts. In the year 1950, we claim close to equalling the gross of the Hippodrome and Town Theatres.

**MR. RAFTERY:**—That is objected to.

**THE COURT:**—What did you say, sir?

**MR. RAFTERY:**—He said he came close to grossing with his theatre what the Hippodrome and Town Theatres grossed. There is no evidence of this, regarding what the Hippodrome or Town Theatres gross, and he has not even testified to what he grossed.

**MR. ROME:**—On the contrary, Mr. Myerberg has testified to what the gross of his theatre was.

**THE COURT:**—If the witness claims he knows, I will let him testify to the comparative figures.

**MR. RAFTERY:**—He said, in the first 12 months he grossed \$122,000, and then it was from February, 1949,

to February 25, 1950. Now, he has volunteered the statement that in the year 1950, without telling us what he grossed in 1950, he grossed almost as much as the Hippodrome Theatre, a downtown theatre run by somebody else, and the Town Theatre, run by somebody else. No evidence in this record—

THE COURT:—He has not been asked for the figures. I assume you will ask him.

[392] MR. RAFTERY:—How can he testify to what somebody else grossed?

THE COURT:—He might if he had the information.

MR. RAFTERY:—Where would he get it?

THE COURT:—From them, I suppose.

MR. RAFTERY:—Pure hearsay.

MR. ROME:—Mr. Raftery forgets the fact that in interrogatories in this case, these distributor companies, the defendants, have furnished figures concerning film rental received by them from the downtown first-run theatres, and the gross receipts reported by those theatres to them.

THE COURT:—I will allow it.

MR. RAFTERY:—If that is what he is testifying from, it is different.

Q. (By MR. ROME):—On what do you base the statement. Mr. Myerberg, with regard to the gross that has been earned at the Crest Theatre and its comparison with the grosses earned at the downtown theatres?

A. In the interrogatories that were asked of the distributors during the pretrial examination of this case, which figures you made available to me, I can go even further than that, Mr. Rome. If we would project—I said almost grossed as much. I would say we would have out-grossed them, and I can prove that, without the shadow of a doubt. [393] We played an admission price—

MR. RAFTERY:—I submit that is a voluntary statement of what he thinks he could do.

THE WITNESS:—This is not what I think I could do.

THE COURT:—Go ahead.

**THE WITNESS:**—We grossed \$122,000. The accounting year, normally, for a theatre, if not using the calendar year, is from September to September. What accounting Mr. Rappaport or any other exhibitor, or Warner Bros., or Loew's Incorporated, use, I don't know; but that was the usually accepted method in the business.

My receipts show on a fiscal year basis through February of one year and through February of the next year. I gave the 1950 of the Hippodrome and Town Theatres, because I assume it was from September, 1949 to September, 1950, which closely resembled, or resembled more closely, the period of time that I was trying to compare in my own theatre. If you wish, we can examine the 1950-51 in the same light.

But, to go back to the fact that we charged an admission price at the time of 40 cents, including tax, which gave us 33 cents net, the Town and the Hippodrome—I think the Hippodrome charged 70 cents, although I am not positive. But give them 65 cents, which is 54 cents net, which is 14 cents per admission more than I charged, [394] which would be 42 percent or 43 percent more. If you take that 43 percent and add it to our \$122,000 of actual gross you would come up with a greater amount of gross even though we were playing on a day and date policy, with a theatre a mile away; or suppose we had a run in our own area, not of this sort of run, but with clearance over the other theatres; certainly we could have grossed considerably more than that. But, as Mr. Raftery has said, that is mere speculation. We would have grossed more if we projected the admission price which we would have charged. We would have charged downtown prices if we had day and date with downtown. That comes to a figure greater than the gross of the Town or the Hippodrome Theatre for that year.

**MR. RAFTERY:**—I move to strike out his answer. It is pure speculation, not based upon any figures or books or records of either the Hippodrome or the Town; and it is entirely hearsay on the part of this witness.



THE COURT:—He used admission tabulations.

MR. RAFTERY:—No; we haven't any admission tabulation. I just looked up the record.

THE COURT:—He has given it in his testimony. He spoke hypothetically of figures, but he matched them with figures, or he has used the figure he said he would have charged. [395] I will allow it.

MR. RAFTERY:—An exception, if Your Honor please.

Q. (By MR. ROME):—If you had had access to first-run pictures; how many pictures a year would be needed for the operation of the Crest Theatre?

MR. RAFTERY:—That is objected to. How would he know?

THE COURT:—I did not hear that.

MR. ROME:—I asked how many pictures would be needed by the Crest Theatre if it were to have access to first-run product. Mr. Raftery has said he wonders how he knows. I think the witness' answer will amply demonstrate it.

THE COURT:—That is a good deal more speculative, because it will depend upon the character of the picture, what the public thought of it, how much it had been advertised, the appeal it had emotionally and in every other way, whether a reproduction of a famous play; there are many, many factors which would enter into it.

MR. ROME:—It would range within certain limits.

THE COURT:—I will allow the witness to give the general estimate. I think, as the operator of the theatre, he is entitled to that.

THE WITNESS:—As you have said, Your Honor, it is very true it depends upon the excellence of the picture.

THE COURT:—Not always on the excellence, but [396] notoriety,—doesn't it?

THE WITNESS:—Quite frequently. I would say anywhere between 25 or 35 to 52 pictures a year. I cannot play any more than 52, because the policy would be on a week basis. The number less than 52 would depend solely

upon the box-office value of the picture. It may be anywhere from 25 to 52.

Q. (By Mr. Rome):—If your theatre were to play first run pictures, how many more prints of film would that make necessary to be furnished to the City of Baltimore?

A. One, if my theatre played first run, if there is only one print being played downtown.

Q. How many theatres a day in Baltimore play the first subsequent run on the same date?

A. Between 22 and 30, depending upon the picture.

Q. Meaning, as you have testified, each one of those theatres means a print of the picture?

A. Yes. That would be anywhere, let us say, from 22 to 30 prints of the picture, simultaneously.

Q. What clearance would you ask for the Crest Theatre if it were to have access to first run pictures?

A. The same clearance as downtown now enjoys,—with the exception of the Parkway situation—and I believe that that clearance could be lowered as time went on.

Q. There has been some statement made that you were [397] attacking the system of run and clearance. Are you leveling any attack against the system of run and clearance?

Mr. WATKINS:—He agreed with the clearance and run.

Mr. ROME:—I will withdraw the question and put it in this way:

Q. (By Mr. Rome):—Are you making any attack on the system of run and clearance in the City of Baltimore?

A. No; runs and clearances, basically, are all right; but they are not all right when they set a definite pattern whereby nobody can come in and nobody can change it, or where people are completely excluded from doing business.

Q. Would the granting of first run product to your

Crest Theatre hurt in any way the downtown first run theatres?

A. No, sir.

Q. Why not?

A. For the first I outlined before, that the largest grossing theatre downtown would only be within 3 percent competition. Assume it is 3 percent; they would not draw more than 3 percent from our area. That is not substantial competition. With plenty of people in our area, we would do more than that. I think this bears out what Mr. Lichtman said in his article that has been introduced here, that there is a great loss of motion picture revenue from [398] people who are the lost audience of the motion pictures. It is not the many other things they talked about; it is this lost motion-picture audience. And that is caused by the rigid control of the first run pictures in the downtown area, making it inconvenient, and sometimes impossible, to go downtown to see them, instead of bringing them out where people can see them conveniently.

Q. Would the granting of first run product to the Crest Theatre hurt the other theatres that are located in the immediate neighborhood of the Crest Theatre?

A. Theatres playing subsequent to the Crest Theatre would be helped. They would be helped because of the large advertising that we would do in the area that would bring the picture to the attention of more people in our area, and its attributes, and also by word of mouth of a larger number of people in our area who saw the picture. That can only help it; it can't hurt it.

Q. Would the granting of first run product to the Crest Theatre have any effect on the public, in your opinion?

A. It would be much more convenient for the public; and I think we would get back into the theatre a great number of the audience that has been lost,—where it would not be necessary for them to make a journey down-



town through the traffic and then try to find a parking place, if they could, at expense. They could come to the theatre and [399] park in our free parking area. And, also, it is more convenient for them, because they do not have to drive through the congested traffic in the congested area.

Q. What you have just said with regard to the convenience it would be to the public from playing first run at the Crest Theatre would be equally true of any other theatre located outside of the downtown area of the city, that is, which had access to first run product?

A. Yes, as long as they have the parking facilities and everything necessary.

Q. The two defendant companies that own theatres downtown are Warner and Loew's. Do any of the other distributing companies which are defendants in this action own any theatres, to your knowledge, Mr. Myerberg?

A. No, sir.

Q. In Baltimore?

A. In Baltimore, no, sir. They own them throughout the country. They own many theatres, and it goes into the thousands throughout the country,—the Big Five.

MR. RAFTERY:—I object. The question was: do any of these defendants other than Warner and Loew's own theatres in Baltimore. The witness says "no".

Q. (By MR. ROME):—Do any of the defendants own theatres anywhere apart from Baltimore?

MR. RAFTERY:—I object. We are trying the [400] Baltimore case. Why go off on side issues?

MR. ROME:—On the contrary, sir, it goes to the very vital issue.

THE COURT:—I will allow it.

THE WITNESS:—Yes, sir, they do. They own thousands of theatres throughout the country.

Q. (By MR. ROME):—What defendants do own theatres?

A. Those known as the Big Five: Loew's Incorporated, Warner Bros., Paramount, RKO—

Q. You mentioned Loew's, Warner Bros., Paramount and RKO. The other one is Fox, isn't it?

A. That is correct; it is Fox.

[408] MR. ROMB:—Members of the jury, Loew's Incorporated answered certain supplemental interrogatories, one of which inquired as follows:

"State year by year the total income received by the Loew's Century Theatre during the years 1948, 1949 and 1950, excluding admission taxes."

Answer by Loew's Incorporated:

"For the year 1948, \$572,014.28; for the year 1949, \$497,317.33; for the year 1950, \$452,036.96."

Interrogatory number 10, members of the jury, inquired as follows:

"State year by year the total income received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admissions taxes."

Answer:

"For the year 1948, \$136,836.77; for the year 1949, \$125,457.00; for the year 1950, \$118,505.84."

A similar interrogatory, members of the jury, was [409] addressed to Warner Brother Circuit Management Corporation as to the Stanley Theatre, and it was answered in the following manner as to the Stanley Theatre:

"For the fiscal year ending August 28, 1948, boxoffice receipts of \$498,378.17; miscellaneous income for that period of time is shown as \$6,192.50; for the fiscal year ending August 27, 1949, boxoffice receipts of \$398,046.59, with miscellaneous income being shown as \$6,174.61; for the fiscal year ending August 26, 1950, boxoffice receipts reported as \$362,083.17, with miscellaneous income being shown as \$7,947.40."

A similar interrogatory was addressed to Twentieth Century-Fox Film Corporation, which answered as follows:

"This interrogatory requests the total amount of admissions paid to each of the theatres to which Twentieth Century-Fox Film Corporation licenses its pictures on first-run, in volume, for the years 1948, 1949 and 1950. Twentieth Century-Fox Film Corporation does not keep records which would enable it to give 'the total amount of admissions' paid to each theatre to which it licenses its pictures on first-run in Baltimore during that period. It does, however, have the boxoffice receipts reported by the exhibitor on pictures licensed on a participation or a percentage basis. The information reported by the exhibitor, it is presumed, does not include admission taxes. Set out below are the [410] total boxoffice receipts for the pictures licensed first-run in Baltimore for the years 1948, 1949 and 1950, for which the requested information is available.

"On most pictures which were licensed on a flat rental basis, Twentieth Century-Fox Corporation has no information as to the boxoffice receipts. Occasionally boxoffice receipts were reported for flat pictures. Where an exhibitor submitted such a report the receipts are included below :

"As to the year 1948 the total boxoffice receipts reported for the New Theatre, \$403,012.14. For the Mayfair Theatre \$9,293.35; for the year 1949 for the New Theatre, \$359,469.66; for the Mayfair Theatre, \$27,268.91; for the Valencia Theatre—"just a statement—" 'flat rental of one picture.' For the year 1950 the total boxoffice receipts of the New Theatre reported as \$287,651.36; for the Mayfair Theatre, \$5,536.20; Keith's Theatre, \$5,166.84; the Little Theatre, \$910.48; the Hippodrome Theatre is reported as having one picture at a flat rental basis, no figures being given."



A similar interrogatory was addressed to RKO Radio Pictures, Incorporated, which answered as follows:

"The following list for the seasons 1947 and 1948, for 1948 and 1949, and for 1949 and 1950, indicates the admissions paid to each of the theatres listed in answer to Interrogatory 1—"that is those theatres to which they licensed first-run pictures in Baltimore"—while a film distributed by RKO Radio Pictures, Inc., was being exhibited in the indicated theatre. This list is limited to films licensed on percentage terms. This amount indicated does not include admission taxes.

"For the Hippodrome Theatre for the season 1947-1948, a total amount of admissions \$177,633.97; for the season 1948-1949 as to the Hippodrome Theatre, \$23,371.72; for the season 1949-1950, \$97,981.60; for the Town Theatre for the season 1947-1948, total amount of admissions, \$253,173.25; for the season 1948-1949, \$224,264.00; for the season 1949-1950 \$124,035.93."

Again a similar interrogatory being addressed to Paramount Film Distributing Corporation, which was answered in the following manner:

"The total gross receipts received on the first-run exhibition of pictures distributed by this defendant or an affiliated or predecessor company at each of the theatres named in the answer to Interrogatory No. 1 for each of the years 1948, 1949 and 1950, were as follows:

For the year 1948 as to the Keith Theatre, \$227,280.60; for the year 1949 as to the Keith Theatre, \$123,356.32; for the year 1950 as to the Keith Theatre, \$130,122.00; for the year 1948 as to the Stanley Theatre, \$61,501.40; for the year 1949 as to the Stanley Theatre, \$65,143.74; for the year 1950 as to the Stanley Theatre, [412] \$104,338.68; as to the Mayfair Theatre in the year 1948, \$43,749.75; in the year 1949 as to the Mayfair Theatre, \$18,935.66; and in the year 1950, \$23,318.25."

There was reported for the year 1950 at the Little Theatre, total gross receipts of \$13,096.00. This added that the amount set forth in the sub-division "A" which I have just read, does not include admission taxes.

A similar interrogatory having been addressed to Columbia Pictures Corporation, it was answered as follows:

"The gross admission receipts exclusive of admission taxes reported to have been received from theatres, from exhibition in Baltimore on first-run of such of this defendant's motion picture features from which film rentals were computed as a whole or in part of gross receipts were as follows:

"For the Hippodrome Theatre for the season 1948-1949, \$109,328.00; for the year 1949-1950, \$144,563.00; for the season 1950-1951, \$22,567.00; for the Town Theatre, the season 1948-1949, \$43,024.00; for the season 1949-1950, \$36,401.00; for the season 1950-1951, \$75,501.00; for the Mayfair Theatre for the season 1949-1950, \$1,799.00; for the season 1950-1951, \$11,745.00; for the Little Theatre for the season 1949-1950, \$3,838.58; for the season 1950-1951, \$1,292.00."

[419] MR. ROME:—I offer that in evidence, sir, as plaintiff's exhibit No. 90, a report headed: "Statement of operations Theatre Enterprises, Incorporated, for the period February 26, 1949 to February 28, 1950.

[421] MR. ROME:—For the period February 26, 1949, to  
[422] February 28, 1950, there is shown as income:

Box Office Admissions....	\$122,796.86	
Income from Concessions.	5,239.49	
Miscellaneous Income ....	283.72	\$128,320.07

There is shown or reported as expenses:

Film Costs .....	\$45,859.21	
Freight and Express .....	589.47	
Stage Attractions .....	440.00	
Payroll .....	29,919.68	
Rent .....	33,000.00	
Repairs .....	27.17	
Taxes and Licenses .....	2,055.16	
Depreciation .....	178.96	
Advertising .....	11,753.44	
Dues and Subscriptions ..	751.00	
Entertainment .....	662.76	
Heat, Light, Power and Water .....	6,709.04	
Insurance .....	1,264.18	
Miscellaneous Operating Expense & Supplies .....	3,997.63	
Service Charges — Equip- ment .....	864.86	
Traveling Expenses .....	290.00	
Telephone and Telegraph .	1,139	
Other Expenses .....	1,610.64	\$140,733.59

[423] Showing a loss of \$12,413.52.

MR. RAFTERY:—For what period was that?

MR. ROME:—February 26, 1949, to February 28, 1950.

MR. RAFTERY:—The first full year?

MR. ROME:—That is right, sir.

(Statement of Operations, Theatre Enterprises, Inc., February 26, 1949 to February 28, 1950, was marked Plaintiff's Exhibit No. 90.)

Q. (By Mr. ROME):—Mr. Myerberg, did Theatre Enterprises, Incorporated, pay any executive salaries to any of its officers or directors?

A. No, sir. Those salaries are only the operating salaries in that statement, as I understand, the salaries of the manager, ushers, clearners, and so forth.



Q. There is an item there shown as income from concessions. What has that reference to?

A. That represents the candy stand, the drink stand, and so forth, in the theatre.

Q. There is shown expenses of \$440 for stage attractions. What has that reference to?

A. We were running a little kiddie show on Saturday morning, and that represents the cost to take care of that, for that period of time. It was a children's amateur stage show.

[424] Q. There is shown an item of \$33,000 for rent. What does that represent?

A. That was the rent Theatre Enterprises was to pay Pem Construction Company for the theatre, the lease on the theatre.

Q. There is shown an item of \$11,753.44 for advertising. If you were to have access to first-run pictures, would your advertising expense go up in any way?

A. Yes; that would increase five or six hundred dollars a week.

Q. There is shown here an item of \$6,709.04 for heat, light, power and water. It has been testified that the Crest Theatre is part of the Hill Top Shopping Center. Did any of those items have reference to any of the shops which are part of the center?

A. It only has reference to the two or three stores that are located in the theatre building and are served by the heating plant of the theatre. However, during that period of time covered by this statement, the stores were unoccupied and the entire amount is attributable to the theatre.

Q. You have already testified, Mr. Myerberg, but will you please give it again, what your weekly operating expenses for the Crest Theatre on this present basis come to?

A. For that period?

[425] Q. Yes.

A. Somewhere between \$1,800 and \$1,900 per week, without film.

Q. Would those operating expenses on a weekly basis be affected in any way if you were to have access to first-run pictures at the Crest Theatre?

A. The only substantial way that would be affected would be through the increased advertising, and perhaps a few more ushers to handle the crowds that would come.

Q. Is there any other way in which your operating expenses would be affected up or down?

A. No, sir.


Q. Despite the amount of gross admissions taken in at the box office, has it been a fact that the Crest Theatre has actually operated at a loss from the period of its opening?

A. Yes, sir.

Q. Some statement has been made by Mr. Raftery concerning the fact that the Hill Top Shopping Center was not a planned shopping center, as is the Edmondson Village. What is your statement with regard to that, Mr. Myerberg? Was it a planned center?

A. I don't know what Mr. Raftery meant by a shopping center, but the shopping center was a completely planned shopping center. It is true, it is not as large as [426] Edmondson Village, and it is a different design than Edmondson Village; but it is our impression that the planned shopping center covers the outward appearance of the buildings, all of the brick, the front trim, the granite that is used in it, the design of the canopy—it is all designed, it was all designed, at one time, as a planned shopping center, along with the parking areas, and so forth. I don't know what Mr. Raftery meant, as I said before, because the thing was planned by an architect, my brother Julius, who was the architect, at one time to be built as a planned shopping center.

Q. Now, the statement has also been made by Mr. Raftery that Baltimore, in so far as its first-run motion pictures are concerned, is an illustration of the greatest



competition in the motion picture industry that one might possibly be able to find. Has it been the fact that there has been the greatest competition in the first-run field in the city of Baltimore?

A. There is great competition for the patronage of each theatre, but there has been no competition whatever between the distributors to license pictures between the theatres.

Q. Will you explain that a bit more?

A. Well, it has been the policy for the New Theatre always to have Fox pictures, except what we call slough [427] pictures, a very second-grade picture, has always gone into the New Theatre for a period of 20 years, as I testified before. The Hippodrome and Town have always had Columbia and RKO, and it seems incredible, but at the same time, they will not give a picture to another theatre where they would have gotten more rentals, as exemplified by the fact that some theatres gross more than others, and it seems the distributors, if there was competition between distributors to go into certain theatres, that they would have sent their pictures into the theatres where they would have got the greatest return; but that has been the practice along that line for 20 years, that I know of.

Q. Has there been any change in the personnel of the branch offices in Washington during the period of time that the Crest Theatre opened?

A. Yes; there has been considerable change.

Q. What changes have come about, to your knowledge, with regard to any of these companies?

A. Well, Mr. Benson is no longer with Paramount. Mr. Isaacs is there. Some of the salesmen that had been with some of the other companies are now with different companies. Do you want me to list them? I can list them.

Q. Have there been any changes in the position of branch manager, with the exception of Mr. Benson being replaced by Mr. Isaacs?



[428] A. Mr. Martin changed to Philadelphia and, unfortunately, subsequently died. Mr. Biersdorf is no longer with Warner Bros. Mr. Rosen has come in to replace Mr. Norris with Fox, and Mr. Norris has moved out. Mr. Minsky, who was then division manager at that time for Fox, is now with Paramount. Mr. Lichtman, who was going a little higher, he was with Metro at one time, and, I think, president of the United Artists at one time, or some executive, is now general sales manager of Fox.

Q. Despite all the changes in the personnel in Washington, has there ever been a visit made to your theatre, to your knowledge, or any investigation made of the situation, as to the Crest Theatre in Baltimore by any of the new people who have come in to replace the outgoing personnel in those Washintgon offices?

A. There may have been, but not to my knowledge.

Q. No one ever came, that you know of?

A. No.

. . . . .

*Cross Examination.*

[498] A. Well, yea, it has a greater potential draw, but evidently it does not draw it because people will not come downtown, and I may further pursue that, Mr. Raftery, and I do not mean to go far from this. Fox Film, as far as a loss to the theatre is concerned, Fox Film has another picture coming up, *DIPLOMATIC COURIER*, I think. You are familiar with it.

Q. I am not.

A. Tyrone Power. Anytime Fox Film wants an offer on that picture to play day and date exclusive in the City of Baltimore, I will give them a \$15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown or exclusive in the City of Baltimore.

Q. Can you tell this Court and jury the date that Mr. Rome on your behalf made the \$35,000 offer to Paramount how much money the plaintiff in this case had in the bank?

A. Very little, in the Theatre Enterprises, but we were willing, as our communication called, to send them a [498] certified check in the amount of \$35,000 if they accepted our bid.

. . . . .

[518] Q. Now, don't you know as a man of some experience in the business, that the usual and the normal manner of showing a picture in any city is to show it on a first run basis in the downtown area?

A. That is the uniform way that the distributors use to completely control and dominate the first run situation in this country, yes, sir, I know that.

Q. You know that?

A. Yes, sir.

. . . . .

[521] THE WITNESS:—May I say something that will clear this up? I think I said a number of times the thing I am objecting to is the elimination of the possibility of any independent exhibitor receiving access to first run pictures located outside of the downtown area of any city. I said of any city, including Baltimore.

THE COURT:—Well, I understood that is what you said in your testimony the past few days.

THE WITNESS:—Yes, sir, I said that.

. . . . .

[534] Q. You knew that each of these eight distributor defendants licensed their pictures to this group of theatres in the manner you have described, with 21 days clearance over all theatres located in and around Baltimore City?

A. Yes, sir.

Q. And that had been, as you put it, the custom for many years?

A. That is correct.

. . . . .

[687] THE COURT:—After all, as I see this case, it is not going to rest upon what kind of shopping center there is there. It is going to turn upon the population within a reasonable radius of this theatre, and the people that live there, and move to and from there, and are likely to frequent this place, either on foot, bus, or in their own automobiles; and it seems to me that the store situation, while it is an attraction, is purely a secondary attraction, if you have sufficient density of population. I am not excluding this, but I am just trying to warn you against giving it a classical designation to all of the [688] shopping centers of Baltimore.

. . . . .

WILLIAM ZIMMERMAN SWORN: . . .

[715] Q. Were you at that time familiar with the way in which your product was licensed in Baltimore City?

A. I was generally familiar with the manner in which we licensed our pictures in Baltimore, yes.

Q. And what was that general manner?

A. Well, we had been licensing our pictures for first run in Baltimore, I think over 20 years, to Mr. Rappaport who owned the Hippodrome Theatre, and I think who at that time had recently completed, maybe a year or two before, the Town Theatre.

Q. Was Mr. Rappaport a satisfactory or unsatisfactory customer?

A. Well, I think that letter that Mr. Brecheen sent me accompanying the letter of Mr. Myerberg illustrates it pretty amply. I think in that letter Mr. Brecheen points out that we have a very, very satisfactory customer in Mr. Rappaport. That was no news to us at the home office.

. . . . .

*Cross Examination.*

[746] Q. Yesterday, under questioning by Mr. Watkins, you said that RKO Radio Pictures, Inc., does not own any



theatres. That is not so, however, with other corporations within the family of the RKO corporations. They own a great many theatres. Isn't that the fact?

A. Well, the fact is this: that prior to December 31, 1950, there was a holding company called Radio Keith Orpheum Corporation, which owned all of the stock of the RKO Radio Pictures, Incorporated. It also owned all of the stock of RKO Theatres, but there was a complete divorcement and disaffiliation in December, on December 31, 1950.

Q. A divorcement stemming from the Paramount case; is that correct?

A. Yes.

Q. And this holding company, which was the holding company of RKO Radio Pictures, Inc., was also the parent company of a corporation which owned the theatres; isn't that so?

A. Yes.

Q. And the corporation which owned the theatres, one [747] of your affiliated companies, owned theatres all over the country; isn't that the fact?

A. Yes. When you say "all over the country", I do not want you to give the impression that we had many hundreds of theatres. Actually, over the country, I would say, in possibly 20 large cities throughout the United States, RKO Theatres would own a theatre.

Q. How many theatres were actually owned by that corporation within the RKO family?

A. I would say there are in the RKO theatre group, roughly, somewhere between 100 and 110. I am not familiar with the RKO theatres now, because RKO Pictures, Inc., have nothing to do with those theatres.

Q. Since this divorcement?

A. For at least two years now.

Q. How many large cities did you say there were in which the RKO Theatre Corporation had theatres?

A. Well, now, I am not an expert on RKO theatre locations.

Q. But, roughly.

A. I gave it at 20. And I said to myself, I wondered whether I am accurate. I can tell they operate in, San Francisco is one, Los Angeles is one, Chicago, Washington, Boston, New York.

Q. And, in those cities that you have in mind, the [748] theatres owned by the RKO Theatre Corporation are located in the downtown area of those cities; isn't that so?

A. By and large, that is correct.

Q. And those are the theatres that have played first-run RKO Radio pictures?

A. Not necessarily, because in many of those cities we have competitive bidding. In fact, in quite a few of them, we have opposition to the RKO theatres bidding against RKO for the product.

Q. That would be only since 1950, though?

A. As a matter of fact, prior to 1950. We even put the bidding in in 1949.

Q. But, prior to 1949, the RKO theatres were playing the product not only of RKO, but of all companies that are distributor-defendants in this action; isn't that so?

A. No; I don't think that is so. As a matter of fact, in most of the large cities, Mr. Rome, RKO would have the product of RKO Radio Pictures, this is prior to 1949, as I say, in many instances, they have competitive bidding; but let's go back prior to 1949. RKO theatres had a product of RKO and possibly one other distributor, you see.

Q. The other members of the so-called Big Five of the industry, Fox, Paramount, Loew's and Warners, and also, to your knowledge, owned theatres in many sections of the [749] country?

A. Yes, sir; they did.

Q. And you are thoroughly familiar with the fact that those companies and the other companies that are defendants in this action are engaged in various phases of the motion picture business, aren't you?

A. Yes. Of course, you mean the Metro distributes pictures, and the Loew's Theatres exhibit pictures,—sure.

Q. The only reason I raise that, Mr. Zimmerman, is due to the fact that the answer that has been filed by RKO in this very suit professes to have no knowledge or information as to the business of these other distributor companies, and I want to establish the fact that this is known to your company?

A. Right. If you mean, as a matter of common knowledge, we in the industry would know that. Of course, I know it. What our lawyers do, as a technical matter, is something else. That is technical pleading, I understand.

Q. Who is the Mr. Mochrie you referred to as being the gentleman you were going to discuss the Crest situation with?

A. Robert Mochrie is our vice-president in charge of domestic distribution.

Q. Is that position comparable to the position referred to as general sales manager?

[750] A. That is right.

Q. Has Mr. Mochrie always been with your company?

A. Mr. Mochrie has been with our company, to my knowledge, since 1938.

Q. Prior to that time, was he with any of the other companies?

A. Yes; prior to that time he was for some period with United Artists, and some period with Warner's, and some period, I think, with FBO, or one of the small producing distributor companies. I don't remember just exactly which. It is back in the twenties.

Q. In the capacity of the sales department, generally speaking; isn't that so?

A. Yes; he was branch manager. He was district manager, and he was division manager.

Q. Always in the sales office?

A. Always in distribution.

Q. And, before he became the person in charge of the domestic distribution for RKO, who had been the sales manager, or the person occupying that same position with RKO?



A. I think his predecessor was Andy Smith.

Q. That is the same Andy Smith who subsequently became the general sales manager of Twentieth Century-Fox?

A. Yes. Now, he is no longer connected with Fox; [751] that is right.

Q. To your knowledge, Mr. Smith was also at one time associated with Warner Bros. in a distribution capacity, wasn't he?

A. Yes; he was.

Q. And the Mr. Goldwyn, whom you referred to, who produces pictures distributed by your company, at one time was one of the important personages having to do with United Artists, wasn't he?

A. I think he was an owner of some of the stock of United Artists by reason of the fact that he produces pictures for them to distribute.

Q. When you say an important phase of the duties of RKO Pictures, Incorporated, is to distribute the pictures of independent producers, you refer to Mr. Disney and Mr. Goldwyn and Mr. Lesser. How many pictures a year are produced by Mr. Disney, usually; that is, feature pictures?

A. I would say he produces about two a year.

Q. About two a year. How about Mr. Goldwyn; how many pictures, feature pictures, does he generally produce a year?

A. I would say he produces about one a year; but there isn't any magic in numbers. It is a question of the importance of the pictures.

[752] Q. I readily appreciate that.

A. Goldwyn releases a very important picture, a picture which might gross over \$5,000,000. Now, that is as important as a half-dozen pictures, or ten pictures, that each produce a half-million dollars.

Q. There is no question about that, Mr. Zimmerman, but, actually, as far as the number of pictures which are

distributed by RKO, it is a fact, isn't it, that the greater number of its pictures are produced by RKO, itself?

A. Yes; but I would say this: I haven't mentioned other independent producers. If we were to list our roster of pictures a third are put out by independent producers.

Q. You know, do you not, who the general sales managers, or the persons in charge of distribution of the other distributor companies, are?

A. Yes; I know them. I know them personally, and I know who they are.

Q. You see them frequently?

A. I wouldn't say I see them frequently, but I see them from time to time, of course.

Q. You have mentioned the fact that you are thoroughly acquainted with the business these other companies are in. That is a fact, is it not?

A. When I say "thoroughly acquainted", I know the [753] business they are in. When you say "thoroughly acquainted", you don't mean the details of their operation? I don't.

Q. You do know however the group of eight companies, the eight distributing companies that are here in this action, produce and distribute by far the greater number of important feature motion pictures in the United States, do they not?

A. They do; and I think they would like to produce even more of them.

Q. I am sure they would.

A. I know we would.

Q. You have referred to the fact that RKO had 32 autonomous branches in various sections of the country. That is also true of the other distributors in this action, generally speaking, is it not?

A. Yes; when you talk about autonomous, to be an autonomy depends on the confidence which the top executives have in a particular branch manager or district manager. Some require more surveillance. The Washington

Branch Manager, for example, Mr. Brecheen, is one of our top branch managers, and he has pretty much carte blanche in a great many matters.

Q. That is not entirely so with regard to all phases of his activity, is it? You have referred to the fact that [754] there are district and division managers over the branch managers?

A. Yes.

Q. And, actually, Mr. Brecheen refers matters to New York for decision?

A. Yes; there is an irreducible hard core of supervision. I am just talking about the degree of supervision.

Q. It is equally true, is it not, that branch managers from as far away as Los Angeles, when a problem comes along regarding a theatre seeking access to first-run pictures, must necessarily submit that to New York?

A. Yes; they submit it to Mr. Walter Branson and myself.

. . . . .

[756] Q. Do you know whether or not the branch manager or division manager who interested himself in the Baltimore situation ever sought to license RKO pictures to any theatres in Baltimore for first-run, other than the Town and Hippodrome Theatres?

A. I frankly don't know that. I know that, of course, we have competitive bidding first-run in Baltimore, because other exhibitors have indicated an interest. Other large exhibitors have indicated an interest in our product first-run; we give them that opportunity. I would say, the reason we did not license the others is that we did not get any request from anybody else for first-run.

[757] Q. As of what time did other exhibitors begin to express interest in your product?

A. This winter.

Q. Just this winter?

A. Yes.



Q. Now, did your own company ever interest itself in seeking to obtain other outlets for first run in Baltimore?

A. Well, now, the only way I can answer it is this: From a business point of view we have Mr. Rappaport, who is a man who has two good theatres. He has the New Theatre, the Town Theatre and the large Hippodrome Theatre. He is an excellent show man. He is a man whom we have enjoyed very good relations with for 20 years. He shows a great interest in RKO pictures. He works very closely with us over the years, and has spent a great deal of money in advertising, in setting up the first run of our pictures, because he realizes the importance of first run to obtain maximum revenue throughout the area. He is one of our best customers in the United States.

Now, I don't think good business requires us to look around for somebody else.

Q. Has there ever been an occasion over these years, Mr. Zimmerman, in which RKO had some particular picture for which it was seeking a large theatre, or, perhaps a theatre that had the potential of returning a greater amount of gross [758] than was being returned by the Town or the Hippodrome Theatres?

A. As far as large theatres are concerned, Mr. Rome, I think the Hippodrome has about 2,250 seats, which is a pretty large theatre, plus the fact that there isn't any real virtue or magic in size. That may be offset, you know, in part by additional playing time. In any event, my point is, the Hippodrome is large enough for the City of Baltimore. When Baltimore was able to support longer runs, Mr. Rappaport went to greater expense to himself and built that Town to give even better representation to our pictures.

So, here was a man who was supporting us on every picture—let us assume this Hippodrome case, but I am talking from a business point of view, let us assume we have a top picture, a picture in which he can make a lot

of money. He supports us on the A-minus pictures. I do not think it would be loyal for us to look for someone else, when he has supported us so well over the years.

Q. He was a thoroughly satisfactory customer to RKO?

A. Oh, an excellent customer, one of the best.

Q. So far as the problem of seating, which you raised, a theatre of 1,600 seats, so far as size is concerned, is completely suitable as a first run theatre, is it not?

A. I would say a theatre of 1,600 seats would be perfectly suitable, as far as seating capacity was concerned.

Q. Are you undertaking to say with regard to the [759] satisfactory nature of your customer relationship with Mr. Rappaport, that that would be sufficient in itself to prevent your product going to any other exhibitor with a suitable theatre to first run product from RKO?

A. I am not saying that. Now, our policy is this: That regardless of how satisfactory our customer relationships are, we think that in order to comply with apparent current legal requirements, if there is a downtown theatre which is a representative outlet, which asks for an opportunity to get our pictures regardless of how satisfactory Mr. Rappaport is, we have some kind of a legal compulsion, no matter how distasteful it is. And it is distasteful for us to leave a very satisfactory customer, and we nevertheless put the pictures up for competitive bidding. That is what we are doing now in Baltimore first run, Mr. Rome.

Q. So that as long as the theatre is suitable, it would have, as you describe it, the right to have access, perhaps, under competitive bidding to your product?

A. Suitable, of course, is a conclusion from a variety of factors. Location would be one, and so forth.

Q. Now, let us take this specific example. Suppose the Crest Theatre was located in the downtown area of Baltimore. Would it have right to have access?

A. Yes.

Q. It would have right to have access to RKO pictures [760] on first run in the City of Baltimore?

A. It would be offered a competitive opportunity.

Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

A. I think that is a fair statement of the reason for our decision.

Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

Q. Is not that true also with regard to other cities in the country?

A. Yes, generally true with respect to other cities, depending on circumstances. Now, when you mean cities, we have permitted in Wichita, Kansas, where the—as I think I explained yesterday—well, it was a smaller city, 150,000, it was not an important key city, you were not running too much of a penalty on subsequent run in depreciating the value of the picture. There you could afford to take a chance, and we did permit bidding, a competitive opportunity, in the neighborhood house to obtain first run in Wichita, Kansas.

[761] Q. Is it not true, however, that there is more likelihood of a city of greater number of people being able to support day and date first run than a smaller community?

A. Well, fortunately that is so, but on the other hand, let us take New York City. It is a very interesting thing that we have never gotten, and there is some big neighborhood theatres in the Bronx.

THE COURT:—I cannot hear you.

THE WITNESS:—I am sorry. I was saying in New



York City, which is our largest city, we have never received a request from a neighborhood house for an opportunity to play first run day and date with Broadway.

What you say is true, and we do have very large neighborhood houses in New York City and you would think throughout the years you at least would have had one request.

Q. (By Mr. ROMER):—And your thought is the larger the City, the less possibility there is for you to undertake experiments?

A. No. That is not my thought. Frankly, I do not know, because we have not experimented in the large cities. But that is not the consideration with respect to a large city. What I have said with respect to a large city is as follows: That in a large city such as Baltimore, where you have a downtown area, which is your important shopping area, where you have your entertainment and where you have a very [762] large number of subsequent run theatres, the success of your exhibition in these subsequent run theatres depends in part upon the exploitation value and the success of your first run.

It also applies to the surrounding area, the exhibition in the theatres in the surrounding area. There, if you play your picture in the neighborhood house, in the mind of the public, in the mind of the exhibitors, it is a "B" picture, it is a small picture, it is an unsuccessful picture.

So, instead of getting top terms from exhibitors on subsequent runs, you get low rentals, low percentages.

Now, the penalty for experimenting in a large city, of putting your picture in a neighborhood house, is so great that we see no reason why we should do it, especially because we think the methods that we have of first run downtown and subsequent runs is a perfectly proper, good, sound marketing method, which gives the public the opportunity of going to the theatre downtown, they can see the picture earlier downtown at a higher admission price. If they want to wait—and there is nothing wrong

in waiting—and they want to see it in a neighborhood theatre at their convenience and at lower admission prices, they can do so. If they want to wait still further, they can do that, and see it at a subsequent run theatre in the neighborhood at still lower [763] admission prices. It seems to me it is not only for the convenience of the public, but we obtain maximum revenue.

We see no reason in the world why we should alter that satisfactory marketing system we have, for Mr. Myerberg.

. . . . .

[769] Q. It is a fact generally recognized in the industry, is it not, if a theatre moves up its availability, places pictures earlier, generally speaking its gross would increase?

A. Generally speaking, yes.

Q. And if a theatre were to have access to first run product as distinct to product on the later availability, that same generalization would hold true, would it not?

A. Yes, but you have to look at the particular cases. I just had an experience with the situation in a town in northern New York where the exhibitor was given the opportunity for first run pictures, and after he had them for a while he found he could make more money operating second run. That is not rare. So that the particular facts determine the answer to that question.

Q. Yes, I agree. But is it not generally true that a greater amount of gross, a greater amount of gross will be earned by a theatre playing first run pictures?

A. Yes, it certainly is true.

. . . . .

[772] Q. You have stated if a picture opens first run in a so-called neighborhood house it is necessarily tagged as a "B" picture. Is not that the necessary result of the fact that as a result of the activities of your company and the other distributor companies, the public has never had

an opportunity to see a first run picture in such a suburban or neighborhood theatre?

A. Well, I would say that is only—I do not know which comes first, the chicken or the egg. I do not know whether the reason is because the picture companies have only put or licensed neighborhood houses with "B" pictures first run or it is because the neighborhood theatres being unimportant theatres, there is no reason to put an important picture in there. When I say "unimportant," I mean unimportant from a point of view of drawing, from the city, to support the first run in that theatre.

Q. Well, how you are able to reach that conclusion, Mr. [773] Zimmerman, if as you have stated to be the fact, you have never experimented in a large city in the United States?

A. Now, let me just say this: This obligation to experiment, I have always wondered how valid that obligation is. In other words, if we have a perfectly satisfactory business way of marketing our pictures, what compulsion is there upon us to abandon this tried and true method, and in a large city experiment with another method with a costly, expensive picture, which would result in the loss of a substantial amount of revenue to us and the only one at the same time that it would satisfy would be Mr. Myerberg.

Q. Now, is it not a fact, Mr. Zimmerman, that one of the reasons why your company and these other companies before us in this action have time and again been found guilty of conspiracy to violate the anti-trust laws, is the fact that you have not experimented?

MR. WATKINS:—I will object to it as having no relevance in law or in fact to this situation.

THE COURT:—I will allow it.

THE WITNESS:—If we have been found guilty we must have been found guilty of conspiring.

Q. (By MR. ROMK):—Is one of the reasons you have been found guilty of conspiring to violate the anti-trust laws is your unwillingness to experiment?



A. I do not know. We are getting in a legal argument [774] here.

I just want to say this: I think if there is any merit in what you have said, it is only because we have failed to experiment when it was to our business interest to do so. Now, I say to you here it would not be to our business interest to do so. That is what I have been saying this morning and yesterday afternoon.

. . . . .

[776] Q. (By Mr. Rome):—Mr. Zimmerman, is it not a fact the net result of the position that has been taken by yourself here and your company, as well as the position that has been taken by the other defendants, is that in effect a fence is placed around the downtown area of Baltimore as well as these other large cities which you speak of with the result that no theatre located outside of that fence, outside of that area, can have access to first run pictures?

A. I do not know if there is a fence. I do not know about the policies of any of the other companies and I am not interested. I am only interested in the policy of RKO, that policy which will give it maximum revenue. Now, I will say this, that the effect of our decision naturally is to confine our first run exhibition of our pictures in the downtown area where it belongs, if that is what you mean.

[777] Q. You said you are not interested in the policies of the other companies and do not know anything about them.

A. I do not say I do not know about them. I do not care about them. All you have to do is look at the newspapers. You can see where Warner's play W, X and Z pictures.

Q. And those are downtown areas?

A. Yes, sir, they are.

Q. Have you ever seen the Crest Theatre?

A. No, I have not.

Q. Has Mr. Mochrie ever seen the Crest Theatre?

A. No, he has not.

Q. Has any New York executive ever seen the Crest Theatre?

A. No. We thought it much more important for the local representatives who know the territory and know the competitive factors, to inspect and make recommendations than to have Mr. Mochrie or myself take flying trips here to Baltimore and make some kind of a decision. And, of course, Mr. Brecheen and Mr. Folliard, both of them, made a thorough inspection of the Crest Theatre and the surrounding territory before we made our decision.

Q. But it was neither Mr. Brecheen nor Mr. Folliard who actually made the decision?

A. But they made the recommendations. In other words, it was their evaluation that there was very substantial [778] competitive conditions between downtown playing first run and the Crest Theatre territory.

Q. You would have known that before, would you not?

A. I would say I would know it generally, but obviously we want to be as thorough as possible.

Q. Is it not necessarily true that so long as there is only one theatre in a city like Baltimore playing your product first run, that it must draw from all the areas of the city where people want to see first run pictures?

A. Yes, of course.

Q. So that there is nothing unusual about the fact that Mr. Brecheen should have told you that the Crest Theatre would be in competition with downtown because it draws from that area?

A. Mr. Myerberg described this very unique character of the Crest territory. He indicated that there was an enormous shift of population, almost like the center of gravity of Baltimore had shifted. I was very interested to

see if there was in effect a new downtown area being created, a second city in Baltimore. If there was that very unique and special situation, of course we might reconsider our decision. Actually, Mr. Brecheen and Mr. Folliard went there and said it was a very nice area, a perfectly nice community, period. But it is a neighborhood area.

[779] Q. Do you know what the population of the area around the Crest Theatre is?

A. ~~Do I~~ I now know? I heard in court some statement as to what the population was.

Q. Did you know what the population was at the time RKO made its decision?

A. As I remember, I asked the figures they had in mind. I certainly was not impressed, and my recollection was it was under a hundred thousand, very substantially.

Q. Who was it that gave you the figure that was under a hundred thousand?

A. Either Mr. Brecheen or Mr. Folliard.

Q. It has been testified, as you now know, Mr. Zimmerman, that the population in the area around the Crest Theatre was, at the time in 1948 when the Crest Theatre was being built, just about a hundred thousand, or 105,000.

MR. WATKINS:—That was the area defined by Mr. Myerberg.

MR. ROME:—I take it that is what we are talking about.

THE WITNESS:—I don't know that. I was talking about the immediate area of the Crest Theatre. I cannot tell you as defined by Mr. Myerberg, because he did not define it for me.

[780] Q. (By MR. ROME):—In your opinion, is a population of 100,000 people enough to support a first-run theatre?

A. I cannot answer that.

THE COURT:—I think we are just going over the same thing in a little different way. The witness has



already answered and given you his views on that. You are just asking it in a little different fashion.

MR. ROME:—I will not pursue that, if I have the answer to that one question.

THE WITNESS:—The only way to answer that, is in relation to downtown. In other words, it has no meaning if the hundred thousand is part of the population of a city that is served by downtown deluxe theatres for first-run.

Q. (By Mr. Rome):—Which, of the Town, or Hippodrome Theatres, do you consider to be your better outlet in the city of Baltimore?

A. Better outlets? I don't know. I think it depends on the type of picture. I imagine that a picture like ~~Private~~ LEATHERNECKS, a big Technicolor picture, drawing from all classes, probably the Hippodrome. If you are talking more of a class picture, I imagine the Town Theatre would be more appropriate. It depends on what picture you are licensing.

Q. You recall, do you not, Mr. Zimmerman, that Mr. [781] Brecheen informed you that in his opinion the Crest Theatre was comparable to the Town Theatre?

A. Yes; I remember that, he said it was a fine theatre, comparable to the Town Theatre, but he said it is a suburban house. I remember the end of that sentence.

Q. Do you know what kind of gross has been earned at the Town Theatre, or at the Hippodrome Theatre, in downtown Baltimore, during the years '48, '49 and '50?

A. I told you about JOAN OF ARC. I don't know what the gross is. I think the Baltimore film rental varies anywhere from 5,000 or 10,000. Around in that figure; I think Mr. Brecheen will be in a better position to tell you the actual figures for 1949.

Q. According to the information furnished us by your company and the other companies in interrogatories, Mr. Zimmerman, it is shown that the Hippodrome Theatre, during the season 1948-49, grossed \$132,699, and it has

been shown that the Town Theatre during that period of time grossed \$267,288. Now, in your opinion, is a gross of \$132,000 the kind of gross that you expect from one of your showcase theatres?

A. Very disappointing; but these grosses were down everywhere.

Q. Are you familiar with the total gross earned by the Crest Theatre on subsequent-run, playing pictures at [782] an admission price which was 57 percent lower than downtown?

A. No; I am not familiar. The only figures I ever saw were the comparative figures that showed that the Uptown grosses more, put more money in the box office, than the Crest.

Q. Would it have any effect on your decision, if it is now brought to your attention that the Crest Theatre, when playing a subsequent-run policy, day and date with theatres which you have described as being in substantial competition, grossed \$122,000?

A. No; it wouldn't. I tell you what we might do: if we found that the Hippodrome was an unsatisfactory outlet, we would look for another downtown outlet. We would not put it in a neighborhood house.

Q. Despite the Crest Theatre at subsequent-run admission prices grossed \$122,000?

A. Of course. I am sorry, I thought you were through.

Q. And, despite the fact that even with the Crest Theatre, if it had played at first-run admission prices, without taking any single additional patron, would have grossed approximately \$200,000, your position would be the same?

A. That is a hypothetical case I would like to [783] answer. I think there is one thing here that has not been brought out; that is, that there is an apparent assumption that people will pay first-run prices, first-run downtown admission prices, to see a picture at neighborhood thea-

tres, I am not at all sure they will,—plus the fact that, actually, if we give you a first-run, I assume here, are you talking of day and date with downtown, or just exclusive?

Q. Either way.

A. Certainly, if you gave it day and date with downtown, we can see no reason to discriminate in your favor. There are many neighborhood first-run theatres, in which event we would probably have to set up six or seven or ten or twelve neighborhood theatres first-run. We have grave doubts as to whether people in those neighborhoods, for the privilege of seeing a picture a week or two earlier, the same picture, will consistently pay first-run downtown prices.

Q. But, again, you don't feel certain, because you have never experimented with it?

A. No. But I can answer, assuming they would.

Q. You are not attempting to suggest that Mr. Myerberg ever suggested to you that he wanted first-run for his theatre, to the exclusion of any other theatre in the so-called suburban section of Baltimore?

[784] A. We didn't know quite that, but he certainly didn't say, "Mr. Zimmerman, I want you to understand that if you give this to me, I don't want you to discriminate against any other theatre, and you can make the pictures available for them." He did not say that.

Q. That would necessarily follow, in your own mind, wouldn't it?

A. It wouldn't necessarily follow, in my mind, if he didn't say it. If I was deciding the way he wanted,—what I would do is something else; what I would have in my mind is that I wanted to be fair, wanted to treat everybody fairly.

Q. You said that the rentals from your downtown theatres might vary from five to ten thousand dollars?

A. I took a guess. I really don't know.

Q. You don't know?

A. I don't know what the figures are. The figures speak for themselves. You must have them.



Q. May I say, then, that according to the figures which your own company has furnished, which was during the season 1947-48, the average rental earned by your company per picture from the Hippodrome Theatre was \$2,028?

MR. WATKINS:—You are dividing the total by 52. You are making an average!

MR. ROME:—No, no. I am taking the ten pictures [785] that played the Hippodrome Theatre, and divided it into the total film rental received by RKO Radio Pictures from those ten pictures.

THE WITNESS:—Have you made the same computation for the Town Theatre?

Q. (By MR. ROME):—Yes; and during the same season, 1947-48, the average film rental per picture for the 16 pictures which played in the Town Theatre was \$5,916?

A. Almost \$6,000; yes. That is probably where I got the five to ten.

Q. Are you acquainted with the fact that during '48-'49 season, the average rental per picture paid by the Hippodrome on the nine pictures played there was \$1,314?

A. Not then. I am now acquainted with it.

Q. May I also bring to your attention that during the season '48-'49, of the 19 pictures of your company that played in the Town Theatre, the average film rental paid was \$2,670?

A. Yes; I know it now.

Q. And, in the season '49-'50, the average film rental per picture paid by the Hippodrome for the ten pictures it had from your company was \$2,911, and during the season of 1949-50, of the 23 pictures played by the Town Theatre, the average film rental was \$1,725. Those are the kind of film rentals you have in mind, then, necessarily, when you [786] speak of the large film rentals earned by your fine downtown outlets in the city of Baltimore; is that correct?

A. No, sir; that is not correct. I certainly have in

mind large film rentals. I would like to say, we would like to have them as large as possible, and I think, as far as the Town is concerned, you have pretty fair film rentals, \$6,000; but let me ask you—

MR. WATKINS:—No.

THE WITNESS:—Pardon me, I am sorry. The questions are so argumentative that I find myself indulging in a kind of a debate, which I would like to avoid.

Q. (By MR. ROME):—It is a fact that, nevertheless, the two outlets of RKO pictures produced film rentals on the averages that I have mentioned?

A. It is a fact; but I would like to add that, having a first-run exhibition of our picture in a downtown house certainly preserves the importance of that picture, however moderate the engagement was, preserves the importance of that picture with respect to subsequent-run, preserves the exhibition value of the picture.

Now, if we are getting argumentative and hypothetical, then I might say to you, on a hypothetical basis, even if it were conceded—and I don't think it is—I don't think it proves that Mr. Myerberg's theatre would have paid us more. But, assuming it did, I think the losses we would [787] have had on the subsequent runs would have been much greater than the additional amount of revenue that Mr. Myerberg's Crest Theatre could give us.

Q. You keep talking about subsequent-run revenues derived by your company. Does your company keep records showing the amount of subsequent-run revenue derived from Baltimore?

A. Of course.

Q. It is a fact, you keep such records for every city where your pictures play?

A. We have records for every city, for every engagement.

Q. Who is Mr. Joseph J. Laub?

A. Mr. Joseph Laub is a lawyer in our company.

Q. He is assistant secretary of RKO Radio Pictures?

A. He is a lawyer. That is his primary function, in the legal department.

Q. Are you acquainted with the fact that Mr. Laub has made a sworn affidavit in this very case?

A. Yes.

Q. In support of objections to the plaintiff's interrogatories, in which we were seeking to find out what the subsequent-run revenue was in the City of Baltimore, and Mr. Laub made this statement under oath:

"RKO Radio Pictures Inc. does not keep any records of the total film rental derived from any particular city."

A. Now you are talking about total film rental. We do not total the film rental. I said to you that we have records of the engagement of our pictures in each theatre. That is exactly what we have. But we do not totalize them. I want to explain that, because it is important. It would require a great deal of additional work to do it, and we see no reason to do it.

Q. So that, actually, the amount of subsequent-run revenue derived from any particular area is not even carried as a separate figure on the books of your company in any way?

A. If Mr. Laub says so, it is true; yes.

[790] Q. (By MR. ROME):—You have stated that your company is interested in the maximum amount of revenue?

A. Yes.

Q. You have also stated that if a theatre were to make a large bid, and then did not earn enough gross to pay that, that there would be adjustments that would be made?

MR. WATKINS:—He did not say that,—if they made a bid, there would be adjustments.

THE WITNESS:—I never adjust on bids,—period,—because that is another way of taking a lower bid.

Q. (By MR. ROME):—So that, actually, if the Crest Theatre were to have access to first-run pictures as a result of bidding, there would be no problem of having to



give it an adjustment in the event its gross did not warrant the bid that was made?

A. That is correct. I also want to point out, if it was a very disappointing performance, or engagement, sometimes you have difficulty collecting from an exhibitor. I don't mean this to make any comment about the financial integrity of Mr. Myerberg—I am sure it is perfectly fine—[791] but we do find that where a situation such as this, where a man might stretch himself out and give a large guarantee, and have a disastrous engagement, there is always the possibility of uncollectibility,—you know that.

Q. But there is no suggestion—

A. None whatever.

Q. —with regard to the Crest Theatre?

A. Certainly not. I am just talking about a general business consideration.

. . . . .  
[795] Q. You refer to the Wichita situation, and your offer to them. Isn't it a fact that Fox had a theatre there, called the Boulevard, which was outside of the downtown area, and which, for a number of years, had access to first-run pictures?

A. I don't know much about it. I think you are right. I will say this: it has happened from time to time, in some cities, smaller cities, where an exhibitor has a first-run [796] downtown, and has another outlet, and thinks he can do better if he runs his other theatre and plays day and date, and you go along with him. It may be against your judgment, but he is your outlet, and he gives you the downtown first-run.

. . . . .  
JOSEPH B. BRECHEEN, SWORN:

[820] A. No, I went with RKO in 1931 and have been with them ever since.

Q. I gather from what has been testified here before today by Mr. Zimmerman, that you, yourself, have a great

deal to do with the handling of the first run account in Baltimore at the Town and the Hippodrome Theatres; is that correct?

A. I do.

Q. Over the years, since you have been with RKO, have you ever attempted to sell RKO products to any other exhibitor in downtown Baltimore?

A. I had no reason to sell RKO product to any downtown theatre in Baltimore. We have a very fine customer in Mr. Rappaport, and we would like to retain the status quo with him.

[821] Q. Did any other exhibitor in downtown Baltimore ever try to license a product from you?

A. Yes, sir.

Q. When before that?

A. Within the past year.

Q. Within the past year. Never before that time?

A. Not that I remember. As a result of that, competitive bidding has been instituted downtown.

Q. There has been offered in evidence here a letter sent by you to Mr. Zimmerman in which you state that the Crest Theatre is in your opinion comparable to the Town Theatre.

A. I am talking about construction and appointments when I make that comparison, and I mean that sincerely. The Crest Theatre is a very fine theatre. But in that recommendation I also said it was a neighborhood house, which it is.

Q. I take it from what you have said, if the Crest Theatre were located in the downtown area, being comparable to the Town Theatre, in your opinion, it would be, in your opinion, entitled to have access to first run product.

A. I think he would definitely be entitled to have an opportunity to negotiate first run product or bid for it.

Q. Actually there was no doubt in your mind, was there, Mr. Brecheen, whenever it came to your knowledge,

however, [822] that what Mr. Myerberg was seeking was either a day and date first run or an exclusive first run?

A. The words "day and date" was never injected into the conversation I had with Mr. Myerberg. The first discussion with me referred to first run product.

Q. But even if he had asked you specifically at that time for a day and date first run, your answer would have been the same, in refusing it?

A. Yes, sir, that is right, it would have been the same.

[825] Q. Bearing in mind, Mr. Brecheen, as you have stated it, you would prefer the downtown outlet if you could get it?

A. That is correct.

Q. Has the policy of playing these fine neighborhood houses in these various cities been a successful one?

A. It is fairly successful.

CHARLES V. GRIMES, SWORN: . . .

[880] Q. Has the playing of first-run pictures in the Ambassador Theatre been a profitable operation, on the whole, for Warner Bros. Circuit Management Corporation?

A. You mean, between the two theatres?

Q. Taking the Ambassador, has the Ambassador been a profitable theatre?

A. Yes; it has been.

[883] Q. You said that the Crest, if it were to have access to first run pictures, other fine theatres located outside of the downtown area of Baltimore would also seek access to first run pictures and that ultimately the Stanley Theatre would have to close. So that actually the basis of your complaint against this attempt on the part of the Crest Theatre to get first run pictures is the fact that it would hurt the Stanley Theatre and Warner Bros. Circuit Management Company; isn't that so?



A. Mr. Rome, I said in my opinion the other neighborhood theatres—

Q. That is what I am talking about.

A. —would seek an equal run with the Crest Theatre, and that ultimately it would destroy not only the Stanley Theatre, I think it would destroy all the downtown theatres.

Q. And that is your basis against the complaint made by the efforts of the Crest; is that right?

A. Yes.

Q. In other words, what you were attempting to do or [884] would like to have done, if I follow you correctly, Mr. Grimes, is to stop any competition coming from the Crest Theatre?

A. No, sir, you do not understand me. That is not my thought at all. I think that the Crest Theatre as a 21-day house, is in substantial competition with us, but I do think that as a first run house it would be greater.

Q. And you do not want it to compete with the Stanley Theatre on first run?

A. That is correct.

• • • • •  
ROBERT SMELTZER, SWORN: • • •

[900] Q. Now, what is the advantage or advantages to you as a distributor of having your pictures shown in a theatre such as the Stanley Theatre in downtown Baltimore?

A. The Stanley Theatre is, in my opinion, the finest show case for product in the City of Baltimore.

Q. Will you keep your voice up?

A. It is an outlet for our product. We have the opportunity of wide exploitation and advertising on pictures. [901] As a matter of fact, the distribution department spends money of their own in exploiting their pictures, and we also have a control of the playing time, which includes the holidays such as New Year's, Christmas, 4th of July, Easter, and it is very advantageous for us,

the Stanley Theatre to have our show case in the downtown area in Baltimore.

[907] Q. Now, let us assume just for the purpose of example that you were to sell Mr. Myerberg a day and date first run at the Crest, to play day and date with any theatre downtown, we will say with the Century, Mayfair or the Stanley, wherever you decided you would license your product on that day and date basis, now, as an experienced distributor in this area, what in your opinion would happen in the event Mr. Myerberg played on a day and date first run?

A. I think we would have an avalanche of protests and demands for similar treatment from the other what we call the key theatres, in these sub-run houses in the City of Baltimore. I don't think they would stand idly by and see their—these exhibitors are all very jealous of their playing position, whether he owns one theatre or owns five, and they believe that their theatre is entitled to just as [908] much consideration as any other theatre in a given city.

We have 20, I think, 25 theatres, that play on the first week of availability, and I imagine the majority of those 25 would ask for a day and date availability if Mr. Myerberg is given that.

Q. And what, in your opinion, would be the effect on the Stanley Theatre, or any other theatre downtown, playing first-run product, if that happened here in Baltimore?

A. Well, depending. The first-run theatre downtown, depending on neighborhood patronage, which I believe we all agree, and has been testified to, it would mean the elimination of the downtown theatre, total elimination of the downtown theatre. I don't think it could survive, with the limited patronage they would have in the immediate area of a downtown theatre.

Q. And, in your answer, you assume theatres like the Boulevard and Northwood and Edmondson Village, and these many other fine theatres in Baltimore, would seek to secure a day and date first-run with Mr. Myerberg's Crest?

A. They would either get it, or we would have a lot of trouble denying them. I don't see how you could deny them. I think you would have to accede to it, if their theatre is comparable, and all the factors that enter into giving a run of that kind, as it is here, whether a 21-day house, they are all comparable. They claim to be comparable as to being a 21-day theatre, and that is the reason [909] they get product in that first week after clearance with the downtown theatre.

. . . . .

[911] Q. Now, the situation over in Washington, from the time Crandall started, right up to the present time, you have always had common ownership between the Ambassador and the Warner, which has been played with the Ambassador?

A. That is right.

Q. And, unless you have common ownership, do you know any way in which you can control advertising, runs or clearances in any competitive area?

A. I don't know of any.

. . . . .

#### *Cross Examination.*

[917] Q. So that, actually, with regard to granting of first-run to the Crest Theatre, you did not have to take it up and did not take it up with New York; is that correct?

A. That is correct.

Q. Isn't that due to the fact that you well know that your company customarily licenses its product for first-run exhibition in the theatres located in the downtown areas of cities?

A. No; I don't know that.



Q. You don't know that to be a fact, Mr. Smeltzer?

A. No. You mean all over the country?

Q. Yes.

A. No. The only thing I could say that we had, the Stanley Theatre is our first-run theatre in the City of Baltimore, and that our product, Warner Bros. Pictures Distributing Corporation pictures, there being common ownership between the theatre and producer, I could give Mr. Myerberg a very quick answer, and told him, and he understood that there wasn't a chance for him to get first-run pictures away from the Stanley Theatre. There wasn't any question about Mr. Myerberg's—

Q. I appreciate that, but isn't it a fact, to your knowledge, that your company customarily licenses its products for first-run exhibition in theatres located in the downtown areas of cities?

[918] A. Wherever it is possible, they make every effort to do it.

Q. That is a general policy of the company?

A. Yes. No; they want to do that, Mr. Rome, because it is the best showcase for your product, in the downtown area, where you have the proper shopping facilities, and you have a chance for both matinee and night performances, your grosses; and your grosses, as a rule, are far greater in the downtown area than they are in the suburban area.

Q. I recognize that your company wishes to do that. There is no question about that, but I simply want to establish the fact that, to your knowledge, your company actually does it. That is the policy throughout the country, to your knowledge; isn't that a fact?

A. Yes; I won't argue that point.

[927] Q. If the Crest Theatre, located where it is, had been owned by Warner Brother Circuit Management Corporation, would it have been able to get access to first run pictures from Warner Brothers?

A. Had we had the Stanley Theatre downtown?

Q. Yes.

A. And had taken them out of the Stanley and put them into the Crest; is that what you mean?

Q. Would it have been able to get access to first run pictures on a day and date basis if the Crest had been owned by Warner Brothers Circuit Management Corporation?

A. Well, being our own theatre—you are applying this now to the Warner Ambassador in Washington, which is a common ownership?

Q. My question is directed solely to the position of the Crest Theatre in the City of Baltimore, located where it is, assuming that Warner Brothers Circuit Management Corporation owned it, would the Crest Theatre, under those circumstances, be able to get access to first run pictures on a day and date basis?

A. Mr. Rome, I do not think so, because we had an experience on that some years ago when we owned the Metropolitan Theatre in Baltimore and we wanted to make the Metropolitan a first run with clearance over the sub-runs of [928] the theatres in the City of Baltimore, and, therefore, there was such a wave of protest on the contemplated action that we just simply dropped it and forgot it. And I presume the same thing would be applicable to the Crest Theatre if we had acquired that.

Q. Isn't it a fact, Mr. Smeltzer, that the Metropolitan Theatre in the City of Baltimore actually played Warner Brothers product on first run?

A. That was the only outlet we could get, Mr. Rome, at that time, for our product. I think that was during the time that Al Jolson made *The Jazz Singer* and we were not able to make a satisfactory deal and we had acquired the Metropolitan Theatre as our own theatre because we were out trying to acquire theatres at that time, I think, all over the country.

Q. Well, now, going back to my question with regard to what would happen to the Crest Theatre if it were

owned by Warner Brothers. I do not think I understood your answer, sir. Would you repeat it?

A. I am not positive we would play day and date.

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ALEXANDER LICHTMAN, SWORN:

[931] Q. (By MR. RAFFERTY):—State your name for the record.

A. Alexander Lichtman.

Q. Mr. Lichtman, will you try to keep your voice up so we can hear you?

A. Yes, sir.

Q. Where do you reside, Mr. Lichtman?

A. I reside at New York City.

Q. And what is your present position in the motion picture industry?

A. Director of distribution for Twentieth Century-Fox.

[932] Q. And when did you join Twentieth Century-Fox?

A. March 7, 1949.

Q. Now, when did you first enter the motion picture business?

A. 1910.

Q. Briefly, tell us your experience.

A. Well, I started as a film salesman in 1910. I became sales manager of the Famous Players Film Company in 1912.

THE COURT:—I cannot hear you. Raise your voice, please.

THE WITNESS:—I became the sales manager of the Famous Players Film Company in 1912. That company developed into what is now known as Paramount Pictures. I was the general manager of Paramount Pictures up until 1921, when I resigned, and I went in business with another man for ourselves and formed the company called the Lichtman Corporation, and made what is known in the trade as Preferred Pictures.



I then subsequently became the vice president and general manager of United Artists Corporation and eventually its president, until November, 1935, when I resigned and I became the vice president of Metro-Goldwyn-Mayer, or Loew's, Incorporated, which is the holding company of Metro-Goldwyn-Mayer. I was there until March 1, 1949.

[933] Q. (By MR. RAFTERY):—During your tenure with Loew's from 1937 until 1949, were you engaged in production as well as distribution?

A. From January, 1938, until March 1, 1949 I was one of the executive producers and one of the executive committee operating the M-G-M studios.

Q. In Culver City?

A. In Culver City, California, yes, sir.

Q. Will you name a few pictures that either you produced or were produced under your supervision during that period?

A. Well, there was *THE WIZARD OF OZ*, the *THIRTY SECONDS FROM TOKIO*, *GREEN DOLPHIN STREET*, *MRS. PARKINGTON*, with Greer Garson, and *KISMET*, with Ronald Colman, and many, many others, about 100.

Q. Now, you retired from Metro-Goldwyn-Mayer and intended to lead a life of retirement sometime early in 1949; is that right?

A. Yes, sir, I did.

Q. And how did you happen to join Twentieth Century-Fox?

A. Mr. Skouras, the president of Twentieth Century-Fox, is a life-long friend of mine and he prevailed upon me to join him and asked me to make a survey of his business because they were losing money in their production and distribution [934] business.

Q. The losses went back to 1947, I believe?

A. From 1947 on they were losing money. So, I consented to come for one year, and I am still there.

Q. Well, now, you did make a survey?

A. I did make the survey, yes, sir.

Q. Of the distribution business of Twentieth Century-Fox in the United States of America?

A. Yes, sir.

Q. And Canada?

A. Yes, sir.

Q. Now, briefly tell us what you did on the survey?

A. Well, I undertook to examine all their records of contracts which deal with exhibitors, by visiting their branches, talking to their employees and also talking to their customers or exhibitors. We also had meetings with the exhibitors, the first one in Boston, followed by one in New Haven and then in Philadelphia, and subsequently on the Pacific Coast. Then in Atlanta and New York.

[935] Q. You covered practically the whole country in that survey?

A. Yes.

Q. And personally visited it with your associates?

A. That's right.

Q. During this period of survey,—by the way, you undertook this survey immediately after joining Twentieth Century-Fox?

A. Immediately after joining that company; yes.

Q. And you were trying to find out why they were losing money on production and distribution?

A. I was trying to find out how we could increase the company's revenue.

Q. Did you meet with exhibitors?

A. Yes; I talked with hundreds of exhibitors. We had luncheon meetings, as I stated before, in exchange centers.

Q. During the course of these various meetings, you addressed these meetings and held open forums and discussed these problems?

A. Right; we did.

Q. And Mr. Rome, who was counsel for Mr. Myerberg, put into evidence Plaintiff's Exhibit 16, a trade paper called, "The Film Bulletin", dated April 11, 1949,

on page 7 of which there appears a story under the caption, "Fox [936] Meetings Forecast Changes in Old Patterns," and then he read from that trade paper.

Now, have you, since he has done that, secured a copy of that trade paper and read the article he referred to?

A. Yes; I did.

Q. Does that article substantially and correctly report the speech you made, either in New York or in Philadelphia?

A. Part of the speech. This was a reporter's report.

Q. Will you tell His Honor and the jury, as best you can remember, what you told the meeting? And, by the way, do you recognize, by that article, whether he is referring to the New York or Philadelphia meeting?

A. I think it was the New York meeting.

Q. Tell His Honor and the jury exactly what you said, in the best memory you have got of it?

A. Well, I said, as one of the means of possibly increasing the revenue for the exhibitors, as well as Twentieth Century-Fox, would be to explore the possibility of possible day-and-date runs in similar large cities, and also to explore the possibility of reducing clearance of the first-runs in the big cities, and enabling the subsequent-runs in the large cities to play the pictures earlier, and that perhaps more of them playing concurrently, or simultaneously than was then prevailing at that present time. It was early [937] in 1949.

Q. You were exploring not only day-and-date first-runs, but day-and-date neighborhood-runs?

A. That's right.

Q. And possibly the creation of more day-and-date first-runs, and possibly the creation of more and more day-and-date neighborhood runs?

A. That is correct.

Q. Were you also considering the possibility in a given situation of staggering runs, if you thought it would help your revenue?



A. Staggering runs? I don't understand what you mean.

Q. Assuming you had a situation where a neighborhood was playing on 21 days after downtown, and you had 25 of those runs; did you give any thought or consideration to moving some of them up to, say, 14 days, and keeping some at 21, and possibly creating a different setup?

A. Not at that time.

Q. Not at that time?

A. Not at that time.

Q. At that time, you were considering multiple runs?

A. That's right.

Q. After you had advanced these various thoughts, and had secured from exhibitors their reactions and what-not, did you delegate some of your assistants to make surveys in [938] all of the large cities that you thought required surveys?

A. Yes, sir; I did.

Q. And was Baltimore one of them?

A. Yes; it was.

Q. Whom did you designate to make the survey in Baltimore and report to you?

A. Mr. Howard Minsky, who was the assistant division manager at that time, and subsequently became the division manager with Philadelphia, Baltimore and Pittsburgh; and Mr. Glenn Norris, who was then our branch manager in Washington, and is now the division manager in charge of Philadelphia, Washington and Pittsburgh.

Q. Did you receive a report from these associates of yours as to Baltimore?

A. Yes; I did.

Q. Now, will you tell His Honor and the jury the report that you got from Messrs. Minsky and Norris in regard to Baltimore on this question of multiple runs?

MR. ROMER:—Excuse me, sir. Do you have a copy of that report, Mr. Raftery?

MR. RAFTERY:—Was that report oral or in writing?

THE WITNESS:—It was an oral report.

MR. ROME:—Will you fix it in time?

Q. (By MR. RAFTERY):—When you got your report, if you remember, when was it?

[939] A. Sometime in '49; I don't remember the exact date.

Q. In all probability—

A. And I got the report directly from Mr. Smith. Mr. Smith was the general sales manager, and these men reported to Mr. Smith, or one of them, Mr. Minsky, reported to Mr. Smith, and in turn Mr. Smith reported to me, as was his custom, daily.

Q. Was that the regular course of operation in your company?

A. It was a regular daily routine.

Q. By the way, Mr. Smith is no longer with your company?

A. Mr. Smith is no longer with us.

Q. Will you tell His Honor and the jury the sum and substance of the report you got through Mr. Smith from Norris and Minsky?

MR. ROME:—I object to that, as being pure hearsay as to this witness. These other persons, who actually made the report, would be better able to testify to it.

THE COURT:—You are asking him the gist of his report?

MR. RAFTERY:—The gist of the report made by his associates in the regular course of business.

THE COURT:—I will allow it.

THE WITNESS:—Mr. Smith told me that after Messrs. [940] Minsky and Norris had made a very thorough survey of the City of Baltimore, that the plan that I proposed was not practical. I asked the reasons, and they said the reasons were as follows:

In the first place, a downtown exhibitor, with whom we have been exhibiting our pictures first-run in Balti-

more for over 20 years, would not agree to playing day and date with any subsequent-run theatre. In fact, they told me that the exhibitor threatened a lawsuit against us if we attempted it. That was the principal thing.

Then I asked them to survey the situation as to creating a better subsequent-run exhibition in the City of Baltimore, and they were for over a week in this city, in their attempt to do that, and they approached practically every important operator of subsequent-run theatres, and they were told by the most influential and most prominent ones, and those exhibitors who gave us the most revenue, that they did not want their conditions disturbed, they wanted to remain status quo, and did not want the exhibition condition in this city to change.

[947] Q. Now, you were out to the Crest Theatre last night?

A. Yes.

Q. That is the first time you have seen it?

A. Yes.

Q. Up until then, you had reports on it from your organization. How did you make an inspection of the theatre?

A. Not a complete inspection, but I walked down one of the aisles; I saw the theatre from the back and from the front, looked up, and the manager of the theatre pointed out the different things about the theatre to me.

Q. You were introduced to the manager by Mr. Norris?

A. Yes.

Q. And you did not meet Mr. Myerberg?

A. No; I didn't.

Q. You have never met him?

A. I never met him.



[948] During this trial, Mr. Myerberg, on page 498, [949] testified as follows, in response to a question that I asked him:

"Fox Film has another picture coming up, *DIPLOMATIC COURIER*, I think. You are familiar with it.

"Q. I am not.

"A. Tyrone Power. Any time Fox Film wants an offer on that picture to play day and date or exclusive in the City of Baltimore, I will give them a \$15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown, or exclusive in the City of Baltimore."

Now, on page 530, he said:

"A. No, sir; and I will return to the offer I made to you for *DIPLOMATIC COURIER*."

Then I said: "I do not sell pictures, I am sorry."

Now, taking into consideration that in your opinion the theatre is not suited for first-run pictures, if Mr. Myerberg were to come to you as the head of distribution of Fox Film, with a certified check for \$15,000, payable to the order of Twentieth Century-Fox, with the further understanding that there would be no adjustment, if he played the picture,—what would your answer be to Mr. Myerberg?

A. I will accept the offer. I will accept it now, but I want to tell Mr. Myerberg, in all fairness, that the [950] last Tyrone Power picture, a good one, the name of it was *RAWHIDE*, only earned, out of 78 runs in the City of Baltimore, \$14,200.

MR. MYERBERG:—I would still make that offer.

THE WITNESS:—I will take your offer. I am glad to get it.

Q. (By MR. RAFTERY):—Mr. Lichtman, in accepting that offer, do you feel you are in any way experimenting in Baltimore on that picture?

A. Not at all.

Q. You may lose your first-run downtown?

A. I am prepared to lose every run. That is more money than I will get if I played all of them, today.

Q. That is your position in answer to that challenge given to me?

A. Yes, sir.

MR. RAFTERY:—You may cross-examine.

THE WITNESS:—I want a certified check.

MR. MYERSBERG:—You will have it.

*Cross Examination.*

Q. (By MR. ROME):—Mr. Lichtman, you have said that you were a director of distribution for Fox?

A. Yes.

Q. Who is the president of Fox?

A. Mr. Spyros Skouras.

[951] Q. Is there a president of the board of Fox?

A. No.

Q. Is there a gentleman named Schenk connected in any way with Fox?

A. We have, yes; he is an executive of the studio in California.

Q. That is Mr. Joseph Schenk?

A. Joseph M. Schenk.

Q. That Mr. Schenk is a brother of Mr. Nicholas Schenk?

A. Yes; a brother of Mr. Nicholas Schenk.

Q. What is the position of Mr. Nicholas Schenk?

A. He is president of Loew's Incorporated.

Q. Mr. Spyros Skouras, who is the president of Fox, has a brother named George Skouras?

A. That's right.

Q. And Mr. George Skouras is the head of a circuit of theatres; isn't that so?

A. That is true.

Q. Do you know approximately how many theatres Mr. Skouras' circuit comprises, sir?

A. Not offhand.

[952] Q. It runs into a great many, does it?

A. Quite a number, yes.

Q. Mr. Skouras has another brother named Charles, has he not?

A. That is right.

Q. Mr. Charles Skouras is associated in connection with running of theatres run by Fox itself; is not that so, sir?

A. He is the president of National Theatres, which presently is a subsidiary of Twentieth Century-Fox.

Q. And how many theatres comprise National Theatres, Mr. Lichtman?

A. Approximately 500.

Q. Those theatres are spread throughout the country, are they not?

A. There are a few in the East, but mostly in the West.

Q. And a great many of those theatres are first run theatres?

A. Quite a few.

Q. Located for the most part in the downtown sections of cities?

A. Many of them, yes.

Q. You mentioned Mr. Minsky who used to be with Fox.

A. That is right.

[953] Q. He is no longer with Fox, is he?

A. No.

Q. What company is he with?

A. He is working with Paramount.

Q. And Mr. Minsky is also the nephew of a man named Kalmine?

A. I don't know all his relatives, no.

Q. Mr. Kalmine is the head of the theatre division of Warner Brothers; is not that so?

A. That is right.



Q. Now, you testified that you were at one time the vice president and general manager of United Artists and subsequently the president of United Artists?

A. That is right.

Q. At one time there was a gentleman named Sears with United Artists; is not that so?

A. He was there after I was there.

Q. Do you know, Mr. Lichtman, that that gentleman named Sears was also with the distribution division of Warner Brothers?

A. Yes, sir, he worked there before.

Q. Who is the present head of the Metro sales division of Loew's Incorporated?

A. A man named Reagan.

Q. Charles Reagan?

[954] A. Charles Reagan.

Q. And Mr. Reagan was for a number of years in the distribution department of Paramount, was he not, sir?

A. Yes.

Q. And there is also a gentleman holding a high position in Paramount named Mr. O'Shea, is there not, sir?

A. I think so. I think that is right.

Q. And Mr. O'Shea used to be with Metro at one time?

A. That is right, sir.

Q. There is also a gentleman named Schwalberg presently with Paramount Pictures?

A. Yes, sir.

Q. Mr. Schwalberg for a number of years was associated with Warner Brothers, was he not, sir?

A. I don't know.

Q. You have no knowledge of that at all, sir?

A. No.

Q. Do you know whether or not Mr. William Scully, who has to do with the sales division of Universal, was also at one time associated with the distribution department of Metro?

A. That is correct.

Q. And there was a gentleman named Blumberg, who was the president of Universal; is not that so, sir?

A. Yes, sir.

[955] Q. And was that same Mr. Blumberg vice president of RKO at one time?

A. Yes, he worked for RKO Theatres at one time.

Q. Now, you know, do you not, Mr. Lichtman, that not only does Fox own theatres, but the other so-called Big Five own hundreds of theatres located in various sections of the country; is not that a fact, sir?

A. Yes.

Q. And those theatres also are in many, many instances first run theatres?

A. Yes.

Q. And those theatres are in the downtown section of cities; is that correct, sir?

A. They own all types and kinds of theatres.

Q. But their first run theatres are located—

A. Some are and some are not. Some are in the suburbs.

Q. Fox licenses its pictures to all of those companies?

A. Not all of them. We sell pictures today theatre by theatre, picture by picture.

Q. Now, over the years hasn't it been the fact, Mr. Lichtman, that Fox has actually licensed and has exhibited its pictures in the theatres owned by Paramount?

A. Some places, yes.

Q. And by Warner Brothers?

A. In some places, yes.

[956] Q. And by Loew's, Incorporated?

A. In some places, yes.

Q. And by RKO?

A. In some places, yes.

Q. And actually Fox has received substantial amounts of money by way of film rental from those other companies?

A. Naturally.

Q. On the other hand, those other companies equally license their product for exhibition in the theatres owned by Fox; is not that so?

A. In some places they do.

Q. And the Fox theatres pay substantial sums of money to those other companies for the licensing of those pictures?

A. Depending on where they buy, what they buy, and when they buy. I have no direct knowledge of that. I have nothing to do with it.

Q. You are in charge of distribution, are you not, sir?

A. Yes. Now, you are asking me do I know what the Fox Theatre Company pays these other companies for film.

Q. Yes, sir.

A. I do not know that.

Q. Your duties in connection with the Fox would not bring you in any way in contact with that information?

A. No, sir.

Q. You know, however, that it has been found as a fact [1957] in a case brought by the Government against your company, not only your present company, but the other companies with which you have been associated in the past, that each one of these distributors has as its best customers the other distributors?

MR. RAPTERY:—That is objected to, in an attempt to get in the finding from the Paramount case.

THE COURT:—I will allow the question. Go ahead.

THE WITNESS:—No, I do not know that to be a fact.

Q. (By MR. ROME):—Are you familiar with the Paramount case, Mr. Lichtman?

A. Somewhat.

Q. Haven't you discussed it with your counsel on numerous occasions?

A. No, I have not. I have read the document, though.

Q. Have you made no attempt to revise your distri-



bution policy since the finding in the decrees in the Paramount case!

A. We have, yea.

Q. In line with that, sir, hasn't it been brought to your attention that it has been found to be so that your company has actually had as its best customer all the other distributor defendants appearing in this case?

A. No, sir.

MR. RAFTERY:—I wish to object to this whole line, for all of the reasons I have heretofore stated.

[958] THE COURT:—I think the witness answered the question before the question was ended.

MR. RAFTERY:—I just want an objection to the line, Your Honor. I do not want to be interrupting my friend here. I think we are getting far afield on it.

Q. (By Mr. Rome):—Mr. Lichtman, the speech that has been referred to that you made, quoted you as saying that the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs, and you were further quoted as saying, "We want pictures with a large expenditure of money for advertising, and we tell the public it can only see it in one theatre. They have to go great distances, at great inconvenience in transportation and other matters." That remains the fact, does it, Mr. Lichtman, that it is inconvenient for a great many people by virtue of the transportation problems in large cities today?

A. It seems so, by the great reduction in income in some of those theatres today.

Q. And one way of remedying that would be to bring the product on first run to the theatres located in areas nearer the people, so they wouldn't have to struggle with transportation; is not that so?

A. But now we find that the revenue is so thin that even the places—I must say this so you get a clear [959] understanding of exactly what I mean and what I have

in mind. You cannot set a national policy with things of this sort. Each city is different from every other city, and you must study each situation separately, and what may apply in one situation will not work in another. So, therefore, each situation has to be studied and worked out in concert and in agreement with your customers, because you can have all sorts of theories as to what may be good distribution practice, but if your customers do not agree with you, you cannot accomplish it. Do you understand?

Q. I understand.

A. O. K., sir.

Q. You were also quoted as saying that "After the run in that one theatre we place the picture in mothballs for a considerable period of time before that picture reaches the fine theatre in the residential sections of these large cities. By that time the advertising is forgotten and other pictures ~~are being~~ announced, with the result that we are losing a great portion of the patronage which, of course, means a great many dollars to all of us."

Your views still remain the same with regard to that, Mr. Lichtman, do they?

A. Not as a blanket proposition, no. You ask me about any specific city and I will answer it if I have information about it.

[960] Q. You were speaking generally when you made this statement either in Philadelphia or New York?

A. Yes, but immediately after that I set my organization to work to make studies of each city. For example, in Philadelphia, as a result of that speech, we reduced the clearance of the Fox theatre that had first run in Philadelphia and increased the number of subsequent runs simultaneously from 9 to 18. We set up 18 different zones. Now, today, I wish I didn't have 18, because the revenue is spread too thin, and if I were to make a speech today to the exhibitors in Philadelphia I would ask them to move some of them back, and I would reduce my terms to those who would move back, because there are too

many of them running day and date today, and I tried to do the same thing in Baltimore. There are too many running day and date in Baltimore. I tried to do it Detroit. There are too many running day and date in Detroit. While in 1949, when I made that speech when business was much better, I felt that was the right thing to do.

Q. You recognize, do you not, sir, your burden is to sell picture by picture and theatre by theatre; is not that so?

A. Yes, sir.

Q. How, then, do you reconcile your obligation in that regard with your statement that you are considering the [961] over-all revenue as being spread too thin.

A. I do not understand your question, sir.

Q. Are you not failing to consider each theatre on its merits as to its right to have access to first run pictures if you consider that the total revenue derived by Fox from any particular situation is less than it has been in the past?

A. I still do not understand your question.

Q. Let me try it this way, Mr. Lichtman: You must consider the Crest on its own merits as a theatre, must you not?

A. That is right.

Q. And the fact that other exhibitors might protest has nothing whatever to do with the right on the part of the Crest Theatre as a theatre to have access to first run pictures or not; is not that so, sir?

A. No, sir, that is not so.

Q. What is your obligation, as you view it, sir, with regard to licensing or not licensing first run pictures to the Crest Theatre?

A. Well, sir, the theory of motion picture distribution from the inception of feature motion pictures, and I think I was one of the men who took part in establishing this thing nationally, was that we would have a representative



first run theatre in each of the big cities of the country, [962] the so-called show case theatres, where we would exhibit the pictures where the greatest number of people in that community would have access to that theatre. Number one.

Secondly, it would act as the exploitation point for that territory, and then we would make the pictures available, based upon the location, class, condition of the theatre, down to the point where we would make the picture available to people of all classes, because as the runs became later the admission prices usually drop also. So, the fellow having only a dime to spend would have the opportunity to see it. That has been the theory of distribution ever since I have been in the business, and that has been almost since its inception.

Q. Has there been any change of that policy over these years, Mr. Lichtman?

A. Not basically, no.

Q. So it remains a fact that the exhibition of pictures on first run remains concentrated in the downtown areas of cities, particularly the larger cities of the country?

A. That is correct.

Q. And is it the fact that no theatre in the City of Baltimore, no matter how fine it might be, would be granted access to first run pictures by your company either on an exclusive or on a day and date basis?

A. I would not say as to the fact. I just accepted the [963] deal because necessity compels me to try to get the most money today, and here is a man willing to lose money, I know he will lose money, when he pays me \$15,000 for a picture. But as you say in Latin. caveat emptor, if he wants to spend his money, let him spend it.

Q. Was there any reason why your company refused to do that before?

A. Yes. And I say it is bad business now from that standpoint. I do not know, I may get the enmity of every exhibitor in Baltimore by doing this, but I am willing to take that risk, because—

Q. I am sorry, sir, I do not understand your answer to my question. My question was: Why did you not do it before, in Baltimore?

A. Because I do not consider it good business to give a theatre, located where the Crest Theatre is, first run in the City of Baltimore.

Q. But you are now willing to do it even though you consider it bad business?

A. The reason I am doing it is because they, your client, made a big bluff here, offered \$15,000 for a picture in a theatre which I do not believe will gross \$15,000, even if he runs the picture three weeks, so I wanted to call his bluff.

Q. Was it never brought to your attention, Mr. Lichtman, [1964] that several years ago this same offer was made through Mr. Smith of your company, at which time the Theatre Enterprises, Inc., the plaintiff in this case, offered your company certified checks by way of guarantee for the licensing of pictures? Was that never brought to your attention?

A. No.

Q. Mr. Smith never discussed it with you at any time?

A. I don't recall.

Q. Now, actually, Mr. Lichtman, there came a time when Mr. Myerberg himself communicated with you directly and informed you of the fact he had been seeking to get first run pictures from your company?

A. I know that. He communicated with me, seeking first run product.

Q. And was there not enclosed with his letter at that time copies of his earlier correspondence and the correspondence with Mr. Smith in the course of which those offers had been made?

A. I don't recall it.

Q. At any rate, it never came to your attention?

A. I don't remember whether it did or not, but I do not recall it.

Q. But presumably if it had come to your attention, you would have been willing to grant the Crest Theatre access [1965] at that time?

A. I do not say that I would.

Q. In these cities in which Fox has its own theatres and has licensed pictures on a day and date first run, there are also subsequent run theatres, are there not, sir?

A. Tell me what cities.

Q. In what cities you covered?

A. You cannot take cities and put them in—

Q. Denver?

A. There are a few.

Q. Kansas City?

A. Yes.

Q. Los Angeles?

A. A great many.

Q. Roanoke.

A. I don't know about Roanoke. I do not have theatres in Roanoke.

Q. But in those cities?

A. We do not have theatres in Roanoke. You said theatres with Fox.

Q. In those other cities we have just mentioned there are a number of subsequent run theatres. Am I correct in that, so I understand you?

A. Yes.

Q. And those subsequent run theatres continued in [1966] business and continue in operation despite the fact there are theatres playing a first run day and date engagement; is not that a fact, sir?

A. Yes, sure.

Q. And the downtown theatres in those areas still continue in business?

A. Some of them. Some are closed. Tell me where and I will answer you specifically.

Q. Mr. Lichtman, we were talking, I thought, sir, about Los Angeles, Kansas City and Roanoke.



A. Some theatres are closed, yes.

Q. Do you attribute that to the fact there has been a day and date policy?

A. No, not necessarily. I attribute it to bad business.

Q. But there has been a general falling off in grosses throughout the country?

A. All over the country.

Q. The practice that Fox has followed in licensing its pictures first run in Baltimore exclusively to the New Theatre is one that was followed for a number of years before the Paramount case; is not that so, sir?

A. I think so.

Q. And during the period of the Paramount case?

A. I do not know. I have only been with Fox since [1967] 1949. I don't know what happened before that.

Q. When you acquainted yourself with the Baltimore situation, Mr. Lichtman, wasn't that brought to your attention?

A. I was out of the distribution for 12 years. I was with M-G-M Studio for quite a while.

Q. When you became director of distribution for Fox in anticipation of your coming here, as well as having in mind the reports made to you by Mr. Smith—

A. Yes.

Q. —did you not learn for years both before and after the years, Fox licensed its pictures to the New Theatre?

A. That is my impression.

Q. And there has never been any alteration in that policy for 20 years?

A. Yes, I think recently there has been an alteration of policy, which Mr. Norris, our division manager, can testify to more in detail or accurately than I can, because this is his job.

Q. That has occurred within the past year, sir?

A. Recently, yes.

Q. You have no personal knowledge with regard to

the fact general competitive bidding has been instituted for Fox products?

A. That is right.

[968] Q. So, theatres other than the New Theatre have access to Fox product, as well as in the City of Baltimore?

A. That is correct.

Q. That competitive bidding, however, exists only among the downtown theatres; is not that so, sir?

A. Presently, yes.

Q. Was there any thought on your part, sir, that it might extend to theatres outside of the downtown theatres?

A. I am no fortune teller. I cannot tell what may happen in the future.

Q. In those few cities in which your company is actually granting first run to theatres outside of the downtown area, is not it a fact, Mr. Lichtman, that your company has done so in order to avoid the principle of uniformity so as to prevent the possibility of evidence being obtained of conspiracy and combination in violation of the Sherman Act?

A. I have no such knowledge of any such thing.

Q. Actually, weren't you so advised by your own counsel, sir, in connection with the city of Cincinnati?

A. No, sir, I did not consult my counsel in connection with Cincinnati. I acted upon my own initiative.

Q. Mr. Lichtman, I want to be fair with you with regard to this, sir. Your statement is you did not consult counsel in connection with the city of Cincinnati in the [969] multiple licensing in the city of Cincinnati?

A. No, I did not. I do not recall that, sir, no, sir.

Q. There has been offered in evidence here in this case, Mr. Lichtman, as plaintiff's exhibit No. 57; a copy of an office memorandum from your company addressed to Mr. H. Blackmer Johnson, from Mr. Gehring, which reads as follows:

"Note the attached which Andy Smith wrote Al Lichtman telling him of the decision we have made re-

garding the distribution of our pictures first run Cincinnati. Mr. Lichtman has asked me to have you give thought to the outline in Mr. Smith's letter and advise me, please, if you have not a legal problem involved."

Do you remember that?

A. That may be so. That does not mean that I consulted a lawyer. Mr. Gehring consulted the lawyer.

Q. It was at your request?

A. That is right. You asked me if I consulted a lawyer in connection with the Cincinnati case, but I know no recollection of it.

Q. Your statement now is you did not do it directly. It was done through Mr. Gehring?

A. Apparently, yes.

Q. Do you remember what advice you were given by [970] your counsel with regard to that situation in Cincinnati?

A. No, I do not.

Q. There has been offered in evidence, Mr. Lichtman, as plaintiff's exhibit No. 58, a copy of a memorandum from Mr. Johnson, who is one of the attorneys for Fox, is he not?

A. That is right.

Q. Which reads as follows:

"As requested"—this is addressed to Mr. Gehring, sir—"we have examined Mr. Smith's memo to Mr. Lichtman of April 6, 1951. Speaking generally, I see no legal objection to the playing policy outlined thereunder. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination."

Do you recall that now, sir?

A. I do not recall it, sir. It wasn't addressed to me, so I do not recall it.

Q. Mr. Gehring never discussed it with you?

A. I do not remember whether he did or not. I do not remember that.



Q. You recognize, do you not, Mr. Lichtman, that by the decision of your company denying access of first run pictures to the Crest up until DIPLOMATIC COURIER, you have thereby fixed the terms and the conditions under which this new \$460,000 theatre is permitted to compete in the [971] motion picture industry; is not that so?

A. I do not quite understand what you mean.

Q. Your decision to deny access to the Crest Theatre to first run pictures, either on an exclusive or either on a day and date basis, has had the effect up until now, has it not, sir, of actually fixing the terms and the conditions and the manner in which this new \$460,000 theatre can compete in the motion picture industry; is not that so?

A. I do not think my action had that effect, no.

Q. At least, insofar as Fox product is concerned?

A. It may be insofar as Fox product is concerned, yes.

Q. And actually, as I understand your views, sir,—please correct me if I misunderstood you—your view is that you wish to continue the operation of first run only in theatres located in the downtown area of cities; is that so, sir?

A. Yes, sir, for the present, sir.

GLENN NORRIS, SWORN:

[991] Q. Did you have any conferences or discussions with Mr. Myerberg prior to the construction of the Crest Theatre?

A. Yes; Mr. Myerberg called on me sometime the early part of the year, January.

Q. 1948?

A. 1948; January, February, or March, I don't remember the exact date, and talked to me about his general idea and plans for a theatre and shopping center which, I believe, at that time he referred to as the Hill Top Theatre.

Q. Did he have any drawings or maps or blue prints at the time?

A. Yes; he had quite an elaborate set of drawings and plans that he had in mind. It didn't mean an awful lot to me, because I don't know much about the construction, and from the plans could not tell very much about what sort of theatre it might be. However, from his description, it would appear that he intended to build a very unusual and very fine theatre.

Q. Did he at that time make any statement with respect to the run of pictures that he hoped to get or expected to get?

[992] A. That he was—that the theatre was designed for first-run pictures and, obviously, a theatre of this type, in a shopping community of the type he was building, was designed for first-run pictures.

Q. Was there any statement by him at that time as to whether he intended to operate the theatre, himself?

A. Yes; his discussion with me was, while it was a general discussion, there was nothing specific, other than the fact that he was building a shopping center and theatre, and the impression on me was, certainly, it left the impression that he intended to operate the theatre, himself. However, he did indicate, during our conversation, that his primary business was that of building and construction; that he had had some experience in the motion picture business, some years previous. I did not get the impression from Mr. Myerberg that he, himself, actually intended to devote his full time to the operation of the theatre.

Q. Did you later on have any further discussions with him?

A. Yes; he called at my office one afternoon, later on in the year, probably September or October. I was in a conference at the time, and I came out of the conference and talked to him for a few minutes. He told me then that his theatre was well underway; that he expected to

have it open within a matter of weeks, a month or so, and he was [993] very anxious to know what would be available for him in the way of first-run pictures, pictures first-run in the City of Baltimore. I explained to him at the time that while he had an attractive theatre, and all of the things he had said about the theatre apparently were developing to be a fact, from what I had seen of it,— it was not completed as of the time that I last saw it,— the location of the theatre was such that, actually, it was suitable primarily, regardless of its appointments, for only a neighborhood operation, because of the location of the theatre.

He wanted first-run pictures, and wanted to continue the discussion along the lines of securing first-run pictures, or consideration for exclusive first-run.

Q. Well, now, did you state to him at that time a final conclusion as to what basis Fox would furnish him pictures?

A. I told him we would offer him pictures on first neighborhood availability, in competition with the Uptown Theatre which, in our opinion, was directly competitive with the Crest Theatre.

. . . . .  
[1004] Q. Mr. Lichtman said he had requested that surveys be made of the large cities, including Baltimore, to determine the feasibility of instituting there either runs day and date downtown and neighborhood or a series of neighborhood simultaneous runs, and he said you and Mr. Minsky had been delegated to make the survey in Baltimore. Does that accord with your recollection?

A. Yes. As a matter of fact, such surveys as we made in Baltimore were being made throughout the entire country by the various divisional branch managers, in an effort to improve if possible the revenue from our pictures. We made quite an extensive survey in Baltimore.



Q. I wonder if you would take just a few moments and describe just exactly what you did.

A. We first analyzed the City of Baltimore from the standpoint of the possibility of establishing a multiple first run system, let us say, of multiple first run—"system" for want of a better word—our idea was, for the sake of something to work with, that we tried to establish four key neighborhood runs that might run day and date with [1005] downtown. I suppose we could have found—we did not actually find four exhibitors who were agreeable to such an arrangement. Mr. Myerberg was agreeable.

There was one, possibly two others who had not the most desirable locations. To be perfectly frank with you, had I had an open choice to select exactly the theatres that I wanted, I doubt very much if the Crest Theatre would have been one of them, because we think there are four other locations in the City of Baltimore that lend themselves much better to that type of an operation than the Crest Theatre could.

However, the Crest Theatre was one of the neighborhood theatres at that time that appeared to be interested in something along that line. We did discuss it with Mr. Myerberg. And we discussed it with, I would say, all of our other customers operating first neighborhood run theatres in the City of Baltimore.

In the main, we found opposition to the plan. I am speaking now of the neighborhood theatres. It would, however, possibly have been possible to find two, three or maybe four neighborhood theatres who would have been agreeable. But the one thing we did run into that we could not get across was the finding of a downtown theatre that would run day and date with those neighborhood theatres. Therefore, as far as I was concerned, Mr. Minsky concurred [1006] with that and subsequently our other executives concurred, so far as I was concerned, in any plan, we did what everyone was doing.

. . . . .

*Cross Examination.*

[1031] Q. There has been some mention, Mr. Norris, about the fact that certain theatres that played this day and date policy were in common ownership. Is it a fact, in your mind, that common ownership would more readily permit a day and date policy?

A. I do not see how it is possible to sell a day and date policy to competing theatres unless it is common ownership.

Q. In your view is one of the factors against granting a day and date first run to a theatre like the Crest the fact that it would affect subsequent run revenues?

A. Well, my position as to the Crest Theatre, its availability for first run, so far as our pictures are concerned, is that the location of the theatre is such that we are placing too many hurdles in the way of people to get out [1032] to the Crest Theatre to see the picture.

Q. There are more hurdles in the way of people going to the Crest than there are in their way to getting downtown, are there?

A. It is my opinion. It is my theory in merchandising anything, which includes motion pictures, it should be made available to the public in the manner that is most convenient for them to see it.

[1033] Q. And your view would be the same, even though the Crest were to have access to first-run product on a day and date basis?

A. Well, the day and date proposition brings up another, a different point, Mr. Rome. I think I explained yesterday, as clearly as I could, at least, the survey that we made in an effort to establish if such could be done, the type of exhibition similar to what you suggest, I think, not to the exclusion of all other theatres in the City of Baltimore in preference to the Crest, but in the interest of developing a pattern of availabilities which might improve our revenue in the over-all from the city.

Q. If I understand your position correctly, Mr. Norris, your view about the Crest Theatre turns upon the problem of location; is that correct?

A. Primarily.

Q. Does there enter into your consideration, in reaching your conclusion, any problem affecting the subsequent-run revenues that would be derived by Fox if a day and date first-run outlet were instituted with the Crest Theatre?

A. I think, if it were possible to develop a day and date arrangement with a representative number of theatres in the City of Baltimore, which would not preclude the possibility of our including a downtown run, we would be agreeable to attempting it. I think I explained that, [1034] yesterday, in the attempts we made to survey the city.

Q. Isn't it the fact that, actually, Fox instituted the multiple first-run on a day and date basis, including a drive-in theatre as one of the theatres playing day and date first-run in Cincinnati, without having a downtown theatre to do it?

A. I believe I heard—excuse me.

MR. WATKINS:—Mr. Lichtman testified to that, fully, yesterday, that they could not get a reduction in clearance. They tried it out on a 14-picture basis, and went back to the old system.

Q. (By Mr. Rome):—I simply want to establish this witness' knowledge concerning the situation. Will you answer my question?

A. My knowledge is primarily what I heard Mr. Lichtman testify yesterday, to the effect that we were unable to sell a downtown run, and I would say, doing the best we could, in lieu of a downtown run, to sell a group.

Q. So, in your mind if there had been in the City of Baltimore a downtown theatre agreeable to playing Fox product on a day and date basis with the Crest Theatre, and perhaps two or three other theatres located outside of the downtown section, Fox would have been prepared to go ahead and grant the Crest, and those other theatres, first-run in the City of Baltimore?



[1035] If such an arrangement could have been worked out in a practical manner, yes. However, the downtown theatres feel, and I feel convinced, pretty thoroughly, that such an arrangement was impossible from their standpoint.

Q. Whom did you talk with, of the downtown exhibitors who took that view?

A. All of them. I would say, with the exception of Loew's and Warner's.

Q. Who, specifically, Mr. Norris?

A. The New Theatre.

Q. You saw Mr. Mechanic there?

A. And the Hippodrome Theatre.

Q. Was it Mr. Mechanic you saw?

A. Yes.

Q. And then Mr. Rappaport?

A. Yes.

Q. Whom else did you see?

A. I don't recall any others. Yes; Mr. Schanberger, I did discuss it with Mr. Freddie Schanberger.

Q. Of the Keith Theatre?

A. Yes.

Q. Did you approach anyone else in the downtown exhibitors with regard to it?

A. No.

Q. Did you consult anyone concerning the Mayfair [1036] Theatre as to the use of the Mayfair Theatre to do it?

A. I don't recall any discussion in connection with the Mayfair Theatre.

Q. Do you consider the Mayfair Theatre as an acceptable first-run outlet in the City of Baltimore?

A. Only if another—only if neither of the other theatres are available.

Q. The Mayfair Theatre is a theatre located right next door to the Stanley Theatre?

A. Yes.

Q. And Mr. Mechanic and Mr. Rappaport and Mr.

Schanberger all took the view that they were opposed to this idea and they would not do it; is that correct, sir?

A. They all took the position, from a financial standpoint, that it was not good business to do it.

Q. They did not want the competition of the Crest Theatre, or any other theatre, coming in?

A. They did not say that; they did not mention the word "competition".

Q. What did they say?

A. That it would not be financially profitable for them to do it. They were not interested in licensing any pictures from me on that basis.

. . . . .

SAM GALANTY, SWORN:

[1072] Q. The letter from Mr. Josephs, which has been shown to you by Mr. Watkins, and refers to the fact that it is the policy of your company not to recognize a neighborhood house as an outlet for exhibition of your pictures on first-run, that is the policy of your company, is it not?

A. That letter so states.

Q. And that is true not only as to Baltimore but in other cities throughout the country?

A. I believe our policy is measured in the sense of each given situation. It is not possible to adopt a company that has no theatres to an over-all United States policy. We are trying to treat each situation with every consideration.

Q. Do you know of any cities or towns within your own division, Mr. Galanty, in which Columbia does license its pictures to theatres outside of the downtown area, other than the theatre in Washington, the Ontario, that has been mentioned?

A. Yes; I mentioned a few moments ago the city of Richmond, Virginia, and Roanoke, Virginia, and Norfolk, [1073] Virginia.

Q. They are unusual instances, are they not?

A. They are unusual, in that we find that our market.

Q. Your company licenses its pictures to the other distributor companies which are here, with the exception of Universal and the United Artists, in their theatres throughout the country, does it not?

A. We license our pictures to the other distributors who own theatres in various parts of the United States.

Q. And Columbia Pictures receives each year a substantial sum of money by way of film rentals for your pictures which do appear in those theatres?

A. I can only confine my statement to what we receive in the area in which my activities are confined. I would say, our returns from some of those deluxe theatres operated by other distributors is quite satisfactory.

Q. You said that although the Crest Theatre had fine appointments, and was a well-constructed theatre, its location was in a neighborhood which, in your opinion, did not show the hope of a heavy patronage?

A. That is my statement.

Q. Do you know what the population of the area of the Crest Theatre is, Mr. Galanty?

A. I do not. I have heard certain statements made as to their potential draw, and I did make it my business [1074] to make my own personal survey, and what I saw was a theatre that was located in an area that certainly did not show too much ahead, not remotely a theatre that could be classified or justified as a so-called first-run theatre.

When did you make that inspection, yourself?

A. Very shortly after the theatre had opened its doors.

Q. Have you ever been out there since?

A. Yes; on another occasion.

Q. When was that?

A. I should say, three months ago, possibly longer than that; three to five months ago.

Q. Actually, the policy of your company is such that there would be no theatre in the City of Baltimore located



outside of the downtown area, no matter how fine a theatre it might be, and no matter what it might be willing to offer by way of film rental, that your company would license first-run pictures?

A. No; I did not make that statement. I said we would prefer, wherever humanly possible, to have as our outlet a downtown theatre, particularly in a city with the importance of the City of Baltimore.

Q. You know, do you not, that, actually, the Crest Theatre, or Theatre Enterprises, Incorporated, made bids to Columbia Pictures for JOLSON SINGS AGAIN, and ALL THE KING'S MEN?

[1075] A. Those letters, I understand, were addressed directly to the New York office.

Q. They never communicated with you regarding it?

A. Who?

Q. The New York office.

A. The New York office discussed with me by phone the fact that they had received correspondence, but no copy of the correspondence was ever sent to my desk.

Q. The bids for those two pictures were substantial bids, were they not?

A. That can best be judged by the history of what has happened.

Q. You actually place your pictures in the Hippodrome or Town Theatres downtown because, as you have said, your usual practice, as phrased by Mr. Raftery, is to get the best returns you can get from the City of Baltimore?

A. We measure our returns, Mr. Rome, as I explained, beyond the actual dollar in film rental. I believe, a picture in the City of Baltimore, which is placed in the hands of a fine showman, will give us returns not only confined to the downtown area of Baltimore, but we find that success goes out with the neighborhood theatres, is better out there, and outside of the confines of the County of Baltimore, we have better success.

Q. And that is the result of the exploitation, the [1076] advertising, that flows from the downtown house?

A. A certain touch of showmanship that is applied in the theatres when Mr. Rappaport gives them his attention.

Q. If the Crest Theatre were to have access to the Columbia pictures, and play first-run on a day and date basis with either the Town or Hippodrome Theatres, in your opinion, would there be any less exploitation or publicity or advertising flowing from the two houses, rather than from just the one?

A. You are dealing with a factor that just cannot apply itself. Mr. Rappaport was not agreeable to continue to negotiate for Columbia pictures if we were simultaneously offering the picture to a neighborhood theatre. And, in my opinion, his position was proper.

Q. Mr. Rappaport did not want anyone coming into the first-run field, competing with him, as he thought; is that correct?

A. You will have to ask his reasoning.

Q. You discussed it with him?

A. His position, I explained very clearly, that he would not negotiate further for Columbia pictures if those pictures were offered simultaneously to a neighborhood theatre.

Q. Do you know what the average film rental earned by Columbia Pictures has been from the Town and Hippodrome [1077] Theatres in the last several years?

A. Those figures are available, but I do not have them here. From my memory, I could not make that statement.

Q. If I may inform you, then, Mr. Galanty, from the information furnished by Columbia Pictures on interrogatories filed in this case, during the season 1948-49, 19 pictures played in the Hippodrome Theatre at an average rental to Columbia of \$1,593, and 5 pictures played in the Town Theatre and paid an average rental to Columbia

of \$2,472; in the season 1949-50, 16 pictures played in the Hippodrome and paid an average rental of \$3,648, while 6 pictures played in the Town Theatre and paid an average rental of \$1,328; in the season 1950-51 9 pictures from Columbia played in the Hippodrome at an average rental per picture of \$993, and 10 pictures played in the Town Theatre at an average rental per picture of \$2,939.

Those figures, as given by Columbia, would be in line with your own recollection of the rentals, wouldn't they?

A. I don't question those figures, Mr. Rome, but I should like to call your attention that all of Columbia pictures, with all deference to our producers, are not what might be particularly termed the best product. Despite that, in those figures, the averages you have given, there are many pictures which Mr. Rappaport played first-run that were generally, they did not meet with the same success [1078] in finding a first-run market.

GEORGE M. JOSEPHS, SWORN: \* \* \*

[1091] Q. What was the reason for according to the Crest the treatment it has been given with respect to Columbia pictures?

A. Purely our considered opinion that the Crest Theatre, being a neighborhood house, in a neighborhood location, with a fairly sparse population, was not entitled to an opportunity to exhibit our pictures on first run in the City of Baltimore.

MR. WATKINS:—The witness is with you.

### *Cross Examination.*

Q. (By MR. ROME):—Mr. Josephs, you just said that the area of the Crest Theatre had a sparse population.

A. Well, perhaps the word is wrong. At least a population which is not dense. In other words, the area from which it would have to draw, from the information that was given to me, was not the dense area that we would like to have for a first run theatre.



Q. What information was given to you with regard to the population, Mr. Josephs?

A. No specific information as to figures except it was a residential area not very heavily populated.

Q. Do you consider a population of 100,000 people or [1092] 125,000 people enough to start a first run theatre?

A. It might be enough to support a first run theatre under some circumstances, depending upon the picture that might be exhibited there, but not necessarily to support a first run theatre for all types of product.

Q. You referred to the fact that the offer by Theatre Enterprises of \$7,000 guarantee for ALL THE KING'S MEN was simply insufficient, dollar-wise.

A. We would consider it insufficient if we were considering it at all. We would consider it insufficient for a film rental for first run Baltimore.

Q. Do you know what film rental you received from first run Baltimore from the exhibition of ALL THE KING'S MEN?

A. I am not certain.

Q. According to the interrogatories that your company have answered, Mr. Josephs, Columbia actually received from the first run exhibition of ALL THE KING'S MEN out of the City of Baltimore \$7,182.52.

A. Yes.

Q. And you still consider the bid of a guarantee of \$7,000 so insufficient, that you would not even consider it?

A. Well, definitely, Mr. Rome, in considering bids you cannot determine before a picture plays how much it is going to gross and how much it is going to earn. The basis [1093] of your decision with respect to any offer would be on past experience. We have earned in first run Baltimore out of the Hippodrome and Town Theatres on many of our pictures considerably in excess of \$7,000.

Q. Have you been in court, Mr. Josephs, when I read to Mr. Galanty the average film rentals received from the Town and Hippodrome Theatres for the years 1948-1949, 1949-1950, and 1950-1951?

A. Yes, I heard your averages, Mr. Rome.

Q. And you still say, despite those averages, which are considerably less than \$7,000, that the performance Columbia has had in the past out of the Hippodrome Theatre was such that you were able to look upon the \$7,000 as so insignificant not even to give it a thought for that picture?

A. Mr. Rome, we have various classes of pictures. We have some pictures which we consider extremely important pictures. We have others that are average. We have some pictures which we do not consider have very much grossing possibilities at all. When we judge an offer made on a particular picture it is with regard to the type of picture that it is. And in arriving at a conclusion we compare the offer made with film rental we have received on pictures which we judge to be in the same general classification.

ALL THE KING'S MEN, in our opinion, and as proven [1094] by the final results of the picture, was one of the top pictures, best pictures that we have ever distributed. It subsequently received the Academy Award, and as such in judging an offer made on the picture, we would compare it with rentals which we have received on top pictures exhibited in the City of Baltimore on first run.

Q. But all that you made on its exhibition on first run was \$7,188?

A. I think that we allowed the picture to play too early.

Q. Even though these bids submitted to you came unsolicited?

MR. WATKINS:—Offers.

Q. (By Mr. Rome):—offers came unsolicited, they were not even acknowledged, were they?

A. I do not believe that they were acknowledged. We received them on the letterhead of a firm of attorneys, and we do not as a general rule acknowledge letters that we receive from attorneys.

Q. Mr. Galanty was not able to give us information other than for his particular division, Mr. Josephs, but perhaps you can tell us whether or not it is not the fact that Columbia Pictures licenses its product to the so-called Big Five in their theatres throughout the country?

A. Well, Mr. Rome, in answer to that let me say we [1095] license our product for as much money as we can get in every city in the United States, to whichever exhibitor we find is willing to license our product and pay us those film rentals.

Q. I am perfectly willing to accept that, but won't you answer my question?

A. I will be glad to do so. In many cities of the United States the Big Five, as you refer to them, have theatres and they are willing to license our product in those theatres.

Q. But you do so license your product?

A. Yes, sir.

Q. And is it not a fact that Columbia each year receives from that licensing very substantial sums of money?

A. We are fortunate that we are able to receive substantial sums of money from these theatres.

Q. But is it not a fact that the theatres of these so-called Big Five, taken collectively, actually represent your best customers throughout the country, dollar-wise?

A. I would not say that that is so, necessarily.

Q. Don't you know, Mr. Josephs, that that has been found to be the fact by the court in the Paramount case?

MR. WATKINS:—Objection.

THE WITNESS:—No, I do not know that that has been found to be the fact at all in the Paramount case.

[1096] (By MR. ROME):—These theatres owned by the Big Five distributors, which are first run, are located in the downtown sections of cities?

A. Yes; in many cities they have theatres located in the downtown sections.



Q. And you license your pictures on first run in those theatres in those cities in many, many instances throughout the country?

A. Yes, in many instances throughout the country we license those theatres, that is correct.

Q. The City of Los Angeles was mentioned. To what theatres in the City of Los Angeles do you license your product?

A. At the present time?

Q. Yes.

A. Well, at the present time our pictures are being offered on competitive bidding in the City of Los Angeles.

Q. Before the competitive bidding was inaugurated, to what theatres did you license your product?

A. Our pictures are generally licensed to the Hill Street Theatre, located in downtown Los Angeles, and the Pantages Theatre located in Hollywood.

Q. And both of these theatres are run by RKO, are they not?

A. They are.

[1097] Q. And they are about eight miles apart?

A. I believe so.

Q. Have you any idea of the population of the City of Denver, which was also mentioned?

A. I believe it is something like 300,000.

Q. Actually, Mr. Josephs, according to the census figures, according to the almanac, the population of Denver is 412,000. Can you tell me how many subsequent run theatres there are in the City of Denver, approximately?

A. From my recollection I believe that Denver probably has in the neighborhood of 25 subsequent run theatres, perhaps.

Q. And those subsequent run theatres are still in existence, despite the fact that Columbia has been playing a day and date first run policy in the City of Denver?

A. I wouldn't know if they are all in existence.

Q. These 20 theatres?

MR. WATKINS:—You said despite the fact.

Q. (By MR. ROME):—Are doing business today, their doors are open and they are showing motion pictures?

A. I imagine they are doing business.

Q. And the downtown theatres are also open in the City of Denver, showing pictures?

A. Yes, to the best of my knowledge, they are.

Q. Who is the exhibitor who has the common ownership [1098] of the theatres in Denver in which you show your product?

A. Fox Intermountain Theatres.

Q. That is connected with Fox, which is one of the defendant companies in this case; is that so?

A. I believe so. It is connected with National Theatres.

• • • • •  
[1100] Cross Examination (Resumed).

MR. ROME:—If the Court please, may I, in line with the occurrence of yesterday,—at which time Mr. Lichtman accepted the offer of Theatre Enterprises, Inc. of \$15,000 for the right to exhibit the motion picture *DIPLOMATIC COURIER* on first run in the City of Baltimore—herewith tender to counsel for Twentieth Century-Fox a certified check of Theatre Enterprises, Inc., in the sum of \$15,000 for the right to exhibit that picture on first run in the City of Baltimore.

THE COURT:—I don't know that this is the place to have an offer or sale of movies, or to have any sale.

MR. ROME:—It was simply in order to carry through with what occurred yesterday, in view of the fact that Mr. Lichtman accepted it, and he mentioned the fact that he wanted to have the check. I want to demonstrate the good [1101] faith of our client, in herewith presenting it.

THE COURT:—Mr. Watkins, do you want to say anything?

MR. WATKINS:—If Your Honor please, we are dealing with what happened back in 1948, 1949 and 1950.

THE COURT:—I thought what took place yesterday was sort of a behind-the-scenes affair and did not have anything to do with the case. I did not object to it, but I do not think present-day bargaining has anything to do with the issues in the case.

MR. ROME:—The only reason I mentioned it at all, if the Court please, is that Mr. Raftery had specifically directed Mr. Lichtman's attention to DIPLOMATIC COURIER, and Mr. Lichtman accepted the offer; and I wish to indicate the fact that we do have the check here.

THE COURT:—No doubt, the check will keep. You can take that up afterwards.

Q. (By MR. ROME):—Mr. Josephs, if the Crest Theatre had been located downtown in the City of Baltimore, would your company have granted it access to first run pictures?

A. Yes.

Q. And, if that theatre had been owned by Mr. Rappaport, located where it is now at Reisterstown Road and Rogers Avenue, and if Mr. Rappaport had requested your company to institute a day and date policy in the Town Theatre, for instance, and in the Crest Theatre, would your company have [1102] granted that request?

A. I couldn't answer that. It is hypothetical. It would have to be decided, if at all, by others. I cannot answer the question.

Q. You would have to take it up with your superiors?

A. We would have to discuss the entire situation, and the effect that it would have on other theatres located in the same area and in other neighborhood areas in Baltimore which might be involved, which might result in our having to change our entire method of distribution in the City of Baltimore,—which is a very complex problem.

Q. In any event, you would consider it?



A. We would probably consider the request.

Q. The reason I raised the question with you, Mr. Josephs, is that I gathered from your testimony that the problem of common ownership, as, for instance, the Fox Theatre in Denver, seemed to make it easier on the part of your company to grant the day and date first run; and I think we should point out the fact.

A. With regard to common ownership, there is no doubt but that it is a lot easier to distribute pictures on a day and date policy. If you are going to do it, where you have common ownership, you can control the opening date of your picture, the closing date of your picture, and you have no problem with respect to the placing of your advertising; [1103] you have one exhibitor with whom you have to deal for the placing of your advertising. All of these problems are very important in dating a picture on first run; with respect, particularly, to the closing date, we would want to know when the picture closed. To have it close in both places at the same time is very important to our subsequent problem, because of the first run closing.

Q. To your knowledge, has it happened in the city of Los Angeles, for example, that one house plays the first run day and date with another house who held the picture for a longer period of time than another?

A. No, not with Columbia pictures; we haven't had it happen.

Q. Has it ever happened with any other company, to your knowledge?

A. I would not know.

Q. You know, generally speaking, the fact that the other distributors in this action also license their pictures for the first run exhibition in the theatres located downtown in the city?

A. I do not follow your question.

MR. ROME:—Will you read the question, please?

(The question was then read by the Reporter.)

THE WITNESS:—In the City of Baltimore?

Q. (By Mr. Rome):—No; generally, throughout the [1104] country.

A. Yes; generally, first run exhibition is licensed for downtown theatres around the United States.

Q. Isn't it a fact that your decision not to grant access to first run pictures on the part of the Crest Theatre actually resulted in fixing the terms and conditions under which that theatre could compete in the motion picture industry?

A. I don't know what you mean by "terms and conditions". It did result in a decision on our part that this theatre would exhibit, or would be privileged to license our pictures, on a first sub run availability.

Q. And thereby it fixed the run clearance for that theatre at the first run subsequent availability?

Mr. WATKINS:—On that picture.

Q. (By Mr. Rome):—On that picture, and on any picture that Columbia has licensed to the Crest Theatre?

A. Yes. If our subsequent availability is a certain period after the first run, every subsequent run theatre would be fixed by that plan.

[1110] Q. (By Mr. Rome):—I hand you a letter which has been marked in evidence as plaintiff's exhibit No. 32, Mr. Josepha, from yourself, which was shown to you this morning, and ask you if it isn't a fact—

A. It was not shown to me this morning, was it?

Q. Will you look at it now, sir?

(Document handed to witness.)

Isn't it a fact, Mr. Josepha, in this letter you wrote to Mr. Galanty as follows:

"Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first run on our product."

That is contained in that letter, isn't it?

A. That is correct.

FREDDIE MEYERS, SWORN: . . .

[1117] Q. I show you, Mr. Meyer's, Plaintiff's Exhibit 28, and since it was introduced sometime ago, it might be [1118] worthwhile reading it to the jury. It is a short letter:

"November 26, 1948

Attention: Mr. Martin

"Universal-International Film Corp.

"913 New Jersey Avenue N. W.

"Washington, D. C.

"Dear Mr. Martin:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'HAMLET' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars, (\$7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars (\$7,850.00). We will also place any reasonable guarantee, the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By

"(Sgd) Harry D. Myerberg."



Now, Mr. Meyers, I would like to ask you two questions about the form of this. He refers to submitting a bid. Is that a bid?

A. No, sir. That was no bid to me, and I so told him. [1119] If I remember correctly, I think I answered that letter. I am not sure whether it was that letter or another letter that I replied to. We were not bidding for any pictures, and told him that. When we received that letter, I don't know whether the reply is—whether our reply was to that one, or some other letter, but I know I replied to him; but which letter, I don't remember.

Q. The offer is to pay 50 per cent of the first \$7,850. Is that a guarantee of any sort?

A. It is not.

Q. It is a percentage against a particular figure?

A. A picture might gross \$10,000, and it might gross \$7,000, and it might gross more. If it grosses a thousand dollars, you get 50 per cent of that, or \$500.

Q. Did you accept this offer?

A. I did not go into any discussion with the man, because I thought the man was—I thought he was joking about it. The first thing, the man didn't know his business, frankly, when he tried to buy a highly-specialized picture like *HAMLER* for a neighborhood theatre.

Q. You did not think that was appropriate?

A. When we were running that, we were going to specialty theatres, that cater to special people. I would not say the intelligentsia, but I would say, special people who patronize this kind of picture in downtown theatres and, [1120] therefore, I did not take it serious. I thought he was joking, to be frank.

Q. At any rate, you did not accept the offer?

A. That's right.

. . . . .

*Cross Examination.*

[1121] Q. (By MR. ROME):—Mr. Meyers, if the Crest Theatre had been located downtown, would you have granted it access to first-run Universal pictures?

A. I say Yes; I would give him an opportunity, I certainly would. [1122]

Q. So then, actually, the only reason why it was not granted access to first-run pictures was because of its location, which you considered to be bad; is that so, sir?

A. Yes; that is so.

Q. Your company, Universal, for many years, has it not, has licensed its product for first-run in many instances to the so-called Big Five?

A. I disagree with you. In the first place, I take issue with you, and I don't like to take issue with you, because I am not a lawyer. There is no such thing as the Big Five. Let's eliminate that, right now. I heard you mention that several times. Today, we have three companies, motion picture companies, that have up to a certain time to dispose of their theatres; namely, Fox West Coast—let me say "Fox", not West Coast—but the Fox Theatres, the Warner Theatres, and the Loew Theatres. They have a certain time in which they have to divest their theatres from their production companies. So that eliminates the Big Five, completely; so there are three companies, Mr. Rome, not Big Five. I wish you would not apply that, because it is not right, as far as I am concerned.

Q. At the time that we are speaking of, back in 1948 and 1949, isn't it a fact, Mr. Meyers, that the term Big Five was a well-recognized term in the motion picture industry [1123] try to designate Fox, Warner, Paramount, Loew's, and RKO?

A. It is not a fact, as far as I am concerned.

Q. You never heard that expression?

A. I never heard of it, and I never applied it in that sense, and I never heard of it in that sense, and I never heard of the Big Five. I heard you say that, this morning, and I was amazed.

Q. As of the time we are speaking of, back in 1948

and 1949, those five companies did own theatres throughout the United States, did they not?

A. I don't know when RKO Company was divested, and I don't know when Paramount was divested; and, therefore, I cannot give you a correct answer, whether it was 1948 or 1946. I don't know which.

Q. This divestiture was ordered, these five companies owned theatres throughout the United States, did they not, before divestiture was ordered?

A. I imagine they did.

Q. And, in your capacity as eastern sales manager for Universal, you knew did you not, that Universal pictures were licensed for first-run exhibition in the theatres owned by those five companies over the years you were with Universal?

A. Yes; we did business with all theatres all over the United States; correct.

[1124] Q. Did you specifically do business with these five companies?

A. I imagine so, along with all the other theatres. There are 12,000 theatres in the United States, or were at that time.

Q. You say you imagine so. Don't you know?

A. I wouldn't know. I was only interested in my own part of the country.

Q. That is the part of the country I am talking about.

A. The eastern part of the country, there were some theatres doing business with us, yes, with some of those people who own theatres, and also distributed pictures.

Q. And Universal, in that section of the country that came under your jurisdiction, receives very substantial sums of money each year by way of film rental?

A. I wouldn't know what the amount was. You say "substantial". I don't know. Some money.

Q. Would you characterize it in some other way?

A. I cannot.

. . . . . 8 . . . . .



[1127] Q. You have said that, in your opinion, Mr. Myerberg has put his theatre in an area where a man was not entitled to put a theatre. Is that correct?

A. I didn't say "no man"; there are a lot of people in our business, as well as in other lines of business—he decided to put a theatre in that area. Why, I don't know. If it was me, with the experience I had, or other people, with the experience that they have had in the theatre business, they would not have put a theatre in that area.

Q. That is because, in your experience, first-run pictures, with the rare exceptions you have mentioned here, have always been licensed for exhibition in the theatres located in the downtown areas of cities?

A. I would say Yes.

[1131] Q. There is no doubt, is there, Mr. Meyers, that this letter was requesting the opportunity to license a Universal picture, HAMLET, for exhibition at the Crest Theatre on first-run in the City of Baltimore. The letter say that, doesn't it?

A. That is right; okay.

Q. And, yet, you treated it as a joke?

A. I certainly did, because I didn't think the picture belonged in that theatre at that particular time.

[1132] Q. Well, now, you thought that Mr. Myerberg, or Theatre Enterprises, Incorporated, was simply having a little fun with you, when it wrote this letter?

A. I don't know what Mr. Myerberg was doing.

Q. Do you know what the picture HAMLET earned for Universal by way of first-run in the City of Baltimore?

A. I don't remember. Would you mind refreshing my memory?

Q. Yes; I will be glad to, Mr. Meyers. HAMLET paid, the exhibition of the picture HAMLET, paid to Universal a film rental of \$7,872.82 for its exhibition on first-run in the City of Baltimore.

MR. RAFTERY:—What theatre?

MR. ROME:—It was played at the Little Theatre.

MR. WATKINS:—On two additional runs there.

MR. ROME:—I am talking only about the exhibition at the Little Theatre on first-run.

Q. (By MR. ROME):—In your opinion, was that a large film rental to obtain, for Universal, for the playing of that picture?

A. For that theatre; yes.

Q. Was it a large film rental for Universal to get out of this picture on first-run in the City of Baltimore?

A. Frankly, we were a little disappointed in the results of *HAMLET* in the Little Theatre; yet, that is the [1133] sum of \$7,872, and that is fairly good film rental.

Q. How many seats has the Little Theatre?

A. I imagine, a little less than 300.

Q. Have you any idea of the average film rental earned by Universal from the playing of its pictures on first-run availability in the City of Baltimore?

A. Mr. Rome, you cannot talk to me in terms of averages. If you want to be specific, and tell me what each picture grosses, I will discuss it; but on averages, no averages. And I will tell you why: Each picture has to be treated separately. They vary in quality, and they vary in terms; and I cannot discuss averages.

[1134] Q. (By MR. ROME):—Mr. Meyers, according to the information which has been furnished by Universal, during the season 1947-48, there were 24 pictures that played at the Keith Theatre, and earned an average rental for Universal of \$2,573, and 8 pictures played at the Century Theatre, and paid an average rental of \$2,497; two pictures played at the Mayfair, and earned an average rental of \$365.

During the season 1948-49, 17 pictures played at Keith's Theatre, and earned an average film rental for Universal of \$2,270. Seven pictures played at the Century Theatre, and earned an average rental of \$1,740. Two pictures played at the Mayfair, and earned an aver-

age of \$738. There was one picture played the Stanley, and earned \$1,158; one picture played at the Town, and paid \$750.

During the season 1949-50, 17 pictures from Universal played at Keith's, and paid an average film rental of \$1,747; six pictures played at the Century, and paid an average of \$1,147; two pictures played at the Mayfair, and paid an average rental of \$3,348; and three at the Hippodrome paid an average of \$1,275.

Now, with that information, Mr. Meyers, which I recognize, sir, you consider to be an improper approach to the problem, I want to ask you, sir, whether or not, in your opinion, the Crest Theatre's offer concerning the picture HAMLET would not have returned to Universal a comparable [1135] film rental which you have earned from the playing of your pictures in the theatres downtown?

A. All right, Mr. Rome, let me ask you this question, as to what my rights are, in answering the question. I want to know, first, whether the Court insists that I answer the question, if you use it in terms of averages. If the Court says I must answer the question, I will.

THE COURT:—I think you understand the question. If you cannot answer it—

THE WITNESS:—I do understand the question. Okay.

THE COURT:—If you can answer in some other way, if you can honestly give an answer, go ahead.

THE WITNESS:—Thank you. My answer is, I would not have obtained or earned at the Crest Theatre, upon a 50 percent, these things you call averages.

Q. (By MR. ROME):—Isn't it the fact that no matter what the Crest Theatre would have offered Universal for any of its pictures, that your company still would not have licensed it first-run pictures in the City of Baltimore, either on an exclusive or on a day and date policy?

A. I disagree with you completely. If I were still with the company, maybe I would have serviced the Crest Theatre. I don't know what I would have done. I left



the company in 1949, December 31st; but up to that time I didn't think the Crest Theatre had a chance, in fair play, unless [1136] the man wanted to burn Uncle Sam's money, that he had a chance of returning to a film company, to the Universal Film Company, any kind of money that you are talking about.

Q. Well, then, if I understand you correctly, it would follow that if Theatre Enterprises had offered a sufficiently large film rental by way of guarantee, that Universal, or you, acting for Universal, would have licensed pictures?

A. I don't know what my position would have been after 1949. I don't recall—I don't know what I would have said then.

• • • • •  
EDWARD K. O'SHEA, SWORN: • • •

[1191] Q. Now, Mr. Rome has been asking a question of a number of witnesses to this effect: Is a city of 100,000 people capable of supporting a first run theatre?

A. It certainly is.

• • • • •

*Cross Examination.*

12 04] Q. Isn't it the fact, Mr. O'Shea, that the reason you granted the product to the Ontario Theatre was just because, as you said, that Warner's Ambassador Theatre, a few blocks away from the Ontario Theatre, had for a number of years been licensing product from your company and playing it day and date in the City of Washington?

A. That is right. You mean was that the reason I sold Ontario?

Q. Yes.

A. No, sir. He told me he had, he thought, the finest theatre in the United States and the finest pictures he got from people all over the city and he thought he had a chance in that location.

• • • • •

[1213] Q. Your statement is that the fact that the Warner theatre, the Ambassador, had been playing Paramount products for a number of years and, consequently, the denial of your product to the Ontario would be obviously discriminatory, had nothing whatever to do with your decision?

A. No, sir.

Q. But isn't it a fact that that has had to do with your decision in granting the pictures in other situations, such as in Wichita, Kansas,—the fact that one of these [1214] other large companies had a theatre which had been getting the products from your company in an area outside of the downtown area?

A. I told you that Mr. Sullivan wanted a license for the two theatres. We had been playing the two theatres on pictures at the Fox Miller and Boulevard, and Orpheum and Boulevard. It was one or the other combinations.

Q. There is a letter in the case, sir, which is Plaintiff's Exhibit No. 66, addressed to Harry Hamburg from Mr. Morgan. Mr. Morgan was another one of the lawyers of Paramount, wasn't he?

A. He was in the legal department.

Q. That letter has to do with Wichita, Kansas, and the request of the Tower, which you said was four blocks from the other?

A. Yes.

Q. To get access to Paramount first run in the city of Wichita. In that letter, Mr. Morgan wrote to Mr. Hamburg, who was the branch manager—

A. Yes, and he still is.

Q. "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity."

[1215] Do you still say the fact that these other defendants had been licensing your product in a theatre outside of the downtown area has nothing whatever to do with the decision when an independent comes along and seeks access to your product in a similar manner?

A. I say we should not be accused of discrimination.

Q. "We could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity".

A. Yes; we might have had a lawsuit in Washington. I think that is why they brought the lawyer on.

Q. So it did have to do with the fact that the Warner Theatre had access to your product?

A. Yes. And that is the only way we can license them,—if we sell Warner, to sell the Metropolitan Theatre.

Q. Actually, it remains a fact that your company has a national policy which restricts the showing of your pictures first run to theatres in the downtown area, except in these unusual instances?

A. That is not so.

Q. That is not so?

A. No. We have a national policy regarding the showing of pictures downtown. We want to show them downtown, we want to show them to the best advantage, and under the best advertising and the greatest prestige in a large area, resulting from that film. And we do have a national policy on that basis. We want to play the finest theatres everywhere; we believe the best results can be obtained in playing downtown, populated shopping areas.

Q. That was not my question. Perhaps I did not make it clear. My question was, Mr. O'Shea, that your company does have a national policy which limits the showing of your pictures on first run, particularly in large cities, to theatres located only in the downtown area of the cities?

A. That is the policy generally, yes. That is where we think we can get the best results.

Q. And, no matter how fine a theatre, no matter what it might be willing to offer, if it is outside of the area, it cannot get access to your pictures?

A. No; I did not say that. I did not say that. You heard a man here yesterday say that if they build another Music Hall out there, and put on a \$50,000 stage show, he would be very willing to go out there.



Q. If the Crest Theatre had been located downtown, would it have had access first run to Paramount products?

A. Yes. Even with the same theatre located downtown, it would have been easier for the customers to go in there than to go out to the Crest Theatre and seek it.

Q. If Warner Bros., in addition to having the Stanley Theatre in Baltimore, owned the Crest Theatre where it is [1217] located now, would it have had access to your pictures on a day and date basis?

A. No, sir.

Q. Yet you were willing, and actually did, grant Warner first run day and date in Washington?

A. I have only been with Paramount, as you know, about four years. If you want to sell the picture to the Warner theatre, a very important downtown theatre,—they play the Metro. We sold four other pictures to Loew's Palace and Columbia.

Q. If Warner, in Baltimore, wanted to play that picture day and date, it would have been permitted to do so?

A. At the time the Crest Theatre opened? It would have been denied them.

Q. Actually, Mr. O'Shea, the national policy that you and I have been talking about was a policy that had existed in the Paramount Company before you ever came there?

A. That I don't know at all. I know these two theatres were playing day and date. If you want to ask a specific question about anything else that I know about, I will honestly answer it.

Q. I am not talking about Washington, but about the national policy on the part of Paramount, which you have described, sir, to limit the showing of your pictures first run to theatres located in the downtown section?

[1218] A. That is not the national policy at all. I said we would send out a policy that we want to play the finest theatres, the finest grossing theatres on our pictures; and we point out that we believe this picture, *STREETS OF LAREDO*, is as good as some other picture, they should seek out the early runs, and that this is sort of a test run to find out what the picture is worth, so that we can sell it at the proper terms.

Q. I thought we had agreed——

A. I thought we had, too.

Q. Then—that there is a national policy on the part of Paramount to limit the showing of your pictures on first run, particularly in the larger cities of the country, to theatres located in the downtown area of the cities?

A. We generally like to do that, because that is the best revenue. That is the opportunity for the picture, that is where the most people are, and that is where the best advertising is achieved by us.

Q. That is the policy that you found in the Paramount Company when you joined it? Isn't that right?

A. No, sir.

Q. Paramount had not been doing that before?

A. They had various policies. I don't know what the policy was.

Q. Didn't you make it a principle to inform yourself [1219] as to what had been done in Paramount?

A. I could see the policy.

Q. And the policy had been the same?

A. No; it was different. A policy is liable to change next week, or next month. You are talking about what I found when I got there.

Q. That is correct.

A. It was as I outlined,—to get the finest theatre downtown, the best located theatre, the best one to play it.

Q. You are not suggesting that you are the gentleman who instituted the policy for Paramount?

A. No.

Q. So it had been there before you joined the company?

A. Parts of it.

Q. Isn't that also the policy that had existed in Metro when you were with Metro?

A. Metro had their applicable policy. I would prefer that Metro discuss their policy.

Q. Speaking of the time when you were with Metro and Loew's Incorporated, wasn't it also true in that company that it licensed its pictures for first run exhibition,

as a national policy, in theatres located in the downtown sections of cities?

A. Yes,—the finest theatres they could get. Is there any law against that?

\* \* \* \* \*

JOHN F. MURPHY, sworn: \* \* \*

[1274] Q. (By Mr. Rome):—Mr. Murphy, your duties cause you to have to do with all Loew theatres that are known as out of town theatres, meaning out of the city of New York theatres?

A. That is correct.

Q. That is, throughout the country?

A. That is correct.

Q. How many theatres are there included in that category?

A. About 65.

Q. Can you tell me how many theatres Loew's has in New York City?

A. I am not sure, but I think they have about 60. I am not sure.

Q. Are the 65 theatres that come within your jurisdiction located in any particular section of the country?

A. No, sir.

Q. How many of those 65 theatres are first run theatres?

A. Most of them are. I would say all but six.

Q. And how many of those theatres that are first run are located in the downtown sections of cities?

A. I would say all of them that are first run are located in the downtown section.

[1275] Q. Do you buy or book pictures that play in those houses? What products do you play?

A. I play whatever I can buy.

Q. Do you buy pictures from all the other companies?

A. I would say that we do generally,—except, for instance, we may play Paramount pictures possibly in 6 towns of the number I operate.

Q. It is true, isn't it, that you actually buy or license pictures in some of your situations from every one of the



companies involved here? I do not mean to say by that, Mr. Murphy, that you play the products of all 8 companies in any one house; but, in the 65 theatres, the products of all companies are played?

A. I might buy some product from all companies.

Q. But, actually, in the 65 theatres they return very substantial revenue to the distributors, do they not?

A. Yes.

\* \* \* \* \*

[1282] Q. Mr. Murphy, may I direct to your attention, sir, the fact that Loew's Incorporated has answered interrogatories in this case in which it is stated as follows:

"State year by year the total income"—the total income—"received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admission taxes.

"Answer. For the year 1948, \$136,836.77; for the year 1949, \$125,457.00; for the year 1950, \$118,505.84."

Would those figures tie in with your own knowledge of the gross of the Valencia Theatre?

A. Gross receipts?

Q. Gross receipts.

A. That is right.

Q. And that is the kind of gross revenue you have in [1283] mind when you say the Valencia Theatre is a superior producer of revenue to the Crest Theatre; is that correct, sir?

A. I don't say that, and I don't see your point at all, because you are comparing two entirely different things. The Crest Theatre is a suburban theatre operating with maybe two or three changes a week, second run pictures. The Valencia Theatre is a theatre sometimes plays a picture six or seven weeks, the same picture.

Q. It plays that picture six or seven weeks because it is producing revenue; is not that a fact?

A. That is right.

Q. Yet despite the fact it may play a picture for six or seven weeks, its total revenue, for instance, for the year 1949, was \$125,457?

A. That is right. Naturally as you play the picture the gross goes down.

Q. The Valencia played its pictures at regular admission prices?

A. That is right.

Q. Have you any knowledge of the gross revenue earned by the Crest Theatre from the playing of pictures on first subsequent run at first subsequent run admission prices?

A. With two or three changes a week.

Q. With as many changes a week as it used?

A. Yes, you said 122,000?

[1284] Q. That is correct, Mr. Murphy.

And you would still be of the opinion that despite the gross earned by the Crest Theatre on its subsequent run, as contrasted with the gross earned by the Valencia on its first run at first run admission prices, that you would not be willing to take the Crest Theatre and play it first run even if it were to be given to you rent free?

A. Absolutely, I would not.

Q. You have also testified, Mr. Murphy, that in your opinion every theatre in Baltimore is in substantial competition with the Century; is that correct, sir?

A. That is right.

Q. And, consequently, I take it that one reason you were opposed to the possibility of the Crest having access to first run pictures is that in your opinion that would constitute a competitor for the Century Theatres; is that correct?

A. If every theatre in Baltimore is a competitor and the competitor plays the same run as I have, naturally they take something away from you.

Q. I am drawing your attention now directly to the Crest Theatre. The reason why you oppose first run for the Crest Theatre is that in your opinion it would be in competition with the Century Theatre and would possibly hurt the gross of the Century Theatre?

[1285] A. The reason that I feel the Crest Theatre should not be sold first run is that I buy at the Century Theatre

an exclusive right. I pay a lot of money for it with clearance. That is what I buy. That is the only thing a picture is worth; the only value a motion picture has is how new it is, and anything that affects that makes my run less desirable, anything that affects that.

Q. And, consequently, if I follow you, Mr. Murphy, your view is that you do not want anyone else having that new picture?

A. That is right.

Q. I see.

A. Because I pay for an exclusive run. That is the only thing I have to sell.

Q. Are there within your supervision, Mr. Murphy, any drive-in theatres that are owned by Loew's?

A. No.

Q. Isn't it the fact, however, Mr. Murphy, that there have been a large number of drive-in theatres erected around in different sections of the country which had done excellent business despite the fact that they have no matinee patronage whatever?

A. There are a lot of drive-in theatres that do excellent business, that is right.

Q. And they have no matinee patronage whatever; is not [1296] that also the fact?

A. Yes. They play to an entirely different clientele. Your drive-in people, they are not even normal picture-goers, they are a lot of people not going to pictures at all. They are people who may be cripples or maybe the mother did not like to put her shoes on when she went out, or they couldn't find a baby-sitter. Those are the type of people you generally get at drive-in theatres. You generally get some nice people, too, but generally it is a new type of audience.

Q. Your testimony is that only cripples and old ladies who don't like to take their shoes—

A. I did not say that. Whole families sometimes go who normally do not go, because of their peculiar family conditions.

Q. Isn't it a fact the drive-in theatres do not usually



have the same kind of transportation facilities which downtown theatres have?

A. That is right. Drive-in theatres are specialized audience. They have their own peculiar audience.

JEROME ADAMS, SWORN: \* \* \*

[1328] Q. Isn't it a fact, with regard to the playing of Metro pictures first-run in the City of Baltimore, Mr. Adams, that at least recently Loew's product has not gone exclusively to the Century Theatre in the City of Baltimore downtown?

A. With rare exception, until recently, Loew's pictures went exclusively to the Century Theatre.

Q. But now, in the recent months, there has been a change in that?

A. Yes, sir; there has been.

Q. And, consequently, despite the fact that Loew's Incorporated has its own theatre, the Century Theatre, playing first-run in Baltimore, theatres other than Loew's, owned by Loew's, now have access to Loew's product?

[1329] A. That is true.

Q. Downtown first-run?

A. Downtown first-run; that is right.

Q. What was the reason for that change?

A. It was brought about by a request made by Mr. Rappaport, for his Town and Hippodrome Theatres, for an opportunity of bidding for first-run Baltimore. The request was granted.

Q. Had there ever been a similar request from any other exhibitor in the past?

A. From a downtown exhibitor, not to my knowledge; no.

Q. No one playing first-run downtown had ever sought to license a Loew picture?

A. Not to my knowledge; no, sir.

WILLIAM F. RODGERS, SWORN:

[1339] Q. What is your opinion as to the day and date run at the Crest Theatre, of your Metro pictures playing day and date with the Century Theatre?

A. Well, in the first place that would be suicide for the Century.

Q. Will you elaborate on that?

A. Well, in the first place, I do not know who so testified, but I could not help but agree with him that there are other theatres in the City of Baltimore that in my opinion have better facilities, better located, to play on such a run, and if you did it for the Crest Theatre, I don't see how you could deny doing it for other theatres.

The consequence is you would probably have and no doubt likely would have the same unsatisfactory condition as it related to first run as you now have in so many theatres playing the first second run in a city.

Q. Too many in your opinion?

A. Well, it affects the business, but then with the result that a majority of the theatres in Baltimore have complained very bitterly about the fact they have not made enough money, or they are losing money over these last few years, which is largely due, in my opinion, to the number of theatres that are playing simultaneously on a second run basis, so that if a family is disposed to go to their [1340] favorite theatres or one of their favorite theatres over the weekend, there is only one picture playing there in so many theatres, with the result that they do not go but once which I have always contended is one of the most contributing reasons for the falling off of any motion picture attendance. You witnessed here what was testified to by our manager this morning, that you play in two theatres simultaneously but the gross receipts were a little bit more but our returns were less.

\* \* \* \* \*

[1342] Q. By the way, Mr. Rodgers, there has been some testimony here that you sell Metro or somebody has licensed multiple run in other cities other than Baltimore. Are you familiar with those cities, such as Los Angeles?

A. Yes.

Q. Well, briefly tell us about Los Angeles.

A. In Los Angeles we have usually licensed our pictures, but only in two localities, both what I should say would be separate cities. We release only downtown to Loew's State Theatre and the other one we lease our pictures [1343] in Hollywood. They are separate and distinct localities, all with their individual shopping areas, which I have heard spoken of here, as separate communities entirely. People from Hollywood rarely, if ever, go to downtown Los Angeles, and I think there might have been an exception once or twice where we might have leased pictures in Culver City, which is quite removed, away from downtown, and is not a part of the City of Los Angeles, but we discontinued that, too, so we are confined to two.

Then in our own case we have owned two theatres in Boston, one in the downtown section and another again, in a different community entirely, called the Back Bay section of Boston, where we own both theatres, and we have played them day and date, but it is not uncommon for the theatre in the Back Bay section to outgross the theatre downtown, but those are the only two with the possible exceptions of small communities around the country. We may have a few of those where it is just as convenient for the people to go to the outskirts as to downtown. It does not apply in a large city.

Q. Are there any situations you have talked about in any way comparable with the condition you have talked about in the Crest Theatre and the Century?

A. None.

[1344] Q. All things being equal, what is your preference, to show a picture first run in a city the type of Baltimore?

A. My personal experience has been, I seek the place that can give us the greater return, and I have generally found over a long experience there is only one place you can get it dependably, and that is downtown.

[1344] Q. (By Mr. Rome):—Mr. Rodgers, can you tell us, sir, how many theatres Loew's Incorporated has owned or owns [1345] presently in various sections of the country?



A. How many theatres we own?

Q. Yes, sir.

A. Well, I can't tell you offhand how many we own, but I believe we operate somewhere in the neighborhood of 125 or 130 in the United States.

Q. And the greater part of that 125 or 130 are your own theatres, are they not?

A. We lease them if we do not own them, yes.

Q. And in those theatres it is the fact, is it not, to your knowledge, sir, that the other distributors' pictures appear?

A. Oh, I imagine so. I have nothing to do with the Theatre Department, but they could not survive on our pictures alone, I don't believe.

Q. And you know, also, sir, do you not, that Fox owns theatres in various sections of the country?

A. I don't know just what the corporate set-up is of Fox, but they have an organization called The National Theatres that is in some way identified with Fox, but to what extent, I do not know.

Q. And they own theatres in many sections of the country?

A. Yes. They operate many.

Q. And that is true, is it not, of Paramount and RKO?

[1346] A. I don't think Paramount own any theatres any more. I think they are operated entirely separately from the Paramount Producing and Distributing Company, so I have been told.

Q. But until that recent change, Paramount owned a number of theatres?

A. Yes.

Q. And that was also true of RKO?

A. Yes, sir.

Q. And also true of Warner's, was it not?

A. Yes, sir.

Q. And you know, do you not, sir, that Loew's pictures have played in all of those theatres, not in each instance, not in every theatre?

A. To a varied extent, yes.

Q. And Loew's has received very substantial revenues by way of film rental by the exhibition of its pictures in those theatres?

A. Not always. I would not say substantial, no.

Q. But in dollars amount it has been a very large sum?

A. No, I would not say so.

Q. Could you give us some idea of the amount, Mr. Rodgers, from your experience?

A. I only know I do not sell RKO theatres in very many places, so I would not consider their returns to us [1347] substantial as compared to some smaller independent circuits.

Q. Can you give us some idea of the amount of the film rental that you have received over any particular period from RKO, sir?

A. I have been out of touch with the business, that is, directly, within the last six months. I have been away most of the time and I am not familiar with what they are now doing, but I do not think our revenue with RKO over a period of time is very much more, as a general thing, than \$100,000 or \$150,000 in the course of a season.

Q. Isn't it a fact the theatres owned by Loew's are in many instances first run theatres?

A. In many instances, yes.

Q. And those first run theatres are all located, are they, sir, in the downtown sections of cities with the exception of this theatre in Back Bay Boston you mentioned?

A. I don't know of any exceptions.

Q. And is it also the fact, to the extent of your knowledge, sir, that the theatres owned by the other companies that have just been mentioned, are also first run theatres in many, many instances located in the downtown sections of cities?

A. Well, these other companies that you have mentioned have many, many more theatres than we operate and they also have many more smaller operated theatres, I believe, than they [1348] do large operated theatres. They

may be first run, but in very small towns, but they have very many small theatres, which we do not have.

Q. But those theatres to which Loew's has licensed its pictures for first run exhibition, in most instances, to your knowledge, have been in the downtown sections of cities, have they not?

A. Where we license them first run in an area, yes.

[1349] Q. In your opinion, following what you have said concerning the effect on the Century Theatre, I take it your view would be, Mr. Rodgers, that if theatres out of the downtown areas would get first-run picture access, that the revenues derived by Loew's from exhibition of those pictures in the theatres of Fox and Warner's, and so on, would be considerably curtailed?

A. I think, definitely, it would, for many reasons, one that I explained to you a little while ago, and then another reason. These theatres here, that are now playing, for instance, second-run pictures, if they moved up to first-run, we would lose that second-run revenue. Never mind the fact that they would not be able to pay as much, I don't think, as the first-run, in our present system; but we would lose a run in the transaction, which would be very important.

Q. With the exception of the situation in Boston and the city of Los Angeles, has Loew's Incorporated ever experimented so as to confirm your view that theatres outside of the downtown areas are incapable of paying large rentals that Loew's requires?

A. I never had any occasion to experiment, because we usually knew, by playing a number of pictures, what are the percentage of grossing possibilities of theatres, and what the grossing possibilities of the theatres in their present position are, and what are the possibilities of the [1350] theatres that are playing first-run. I did not believe that a company like ours could afford to experiment, considering the cost of productions that are made on our lot.

Q. And then, if I follow you, Mr. Rodgers, when you speak about your experience over many years leading you to this conclusion, what you had in mind, sir, was the fact



that the experience of subsequent-run theatres, first-subsequent-run theatres, led you to conclude that they could not pay the kind of rentals you need on first-run?

A. That is true, because I have seen them move up for a period of time, where a fellow feels he ought to play day and date with another theatre, and you move him up 7 or 14 days, and his gross receipts don't always go up, but others go down.

Q. But you have no experience with regard to theatres outside of the downtown area having access to first-run?

A. Do you mean have I ever experimented, instead of playing first-run, that I would play with a number of neighborhood theatres first-run?

Q. One or more neighborhood theatres; yes, sir.

A. I haven't had that. I have never experimented, to my knowledge, on that.

Q. You have referred to the fact that if the Crest were to have access to first-run pictures with other theatres as good or even better than the Crest, in the City of [1351] Baltimore, they would also seek access to first-run pictures, and that the ultimate result would be suicide for the Century Theatre, downtown?

A. Or any other downtown theatre.

Q. Has your company ever received any request from the operator of any other theatres in the City of Baltimore, other than the Crest, for access to your pictures on first-run?

A. Not to my knowledge, with the exception of, I believe, the Hippodrome Theatre asked for our first-run pictures, sometime ago.

Q. But you have had no request from any other theatre outside of the downtown area?

A. No, sir; not that I know of.

Q. And, in your view, that anticipated demand by such other theatres would lead to the same unsatisfactory condition that you found to exist with regard to a large number of first-subsequent-run houses. In your view, is there any possibility, in the City of Baltimore today, for any new exhibitor coming along and entering the field of

exhibition on a first-subsequent-run in the City of Baltimore, without further aggravating this condition that you refer to?

A. Oh, yes; I should think he could come in, if he has a logical spot to come in, and he builds a theatre, he may competitively bid with the man that was there, or he [1352] might be substantially removed from existing theatres that would merit day and date, but more likely it would be, from my limited knowledge of the city, it would be more likely that he would enter into active competitive bidding with the theatre in that area.

Q. And, in your opinion, that access to pictures largely turns upon the ability to pay on the part of the exhibitor; is that right?

A. That is, generally speaking, true; yes.

Q. Did your company ever attempt to find out what the ability to pay of the plaintiff in this case was, with regard to getting access to Metro pictures on first-run, either exclusively or day and date in the City of Baltimore?

A. You are referring to the Crest Theatre?

Q. Yes.

A. No. We would not have made any effort to experiment in that case, because, as I say, it has been a custom of our company to play our own product first-run in our own theatres. That is the reason we have the first-run theatres and, generally speaking, we built the first-run theatres many years ago for the reason that, in some cases, we could not get an outlet in every case, so we built our own theatres to play our own pictures first-run.

Q. Is that situation changed now by reason of the fact that Metro, as Mr. Adams and yourself have testified, [1353] is now permitting theatres other than the Century Theatre in downtown Baltimore to get access to first-run?

A. I have been told that the Hippodrome, I believe, or the Tower, has competitively bid with Loew's for one, two, or three pictures; but it all has been since I gave up my particular position as general sales manager, and I am not fully acquainted with it, so I couldn't even testify on it.

Q. You said the Tower. I believe you meant the Town?

A. Yes; the Town.

Q. So, you are not prepared to voice any opinion with regard to the change in policy on the part of Loew's to grant access to theatres other than the Century, downtown, and what effect that would have upon the opportunity accorded the Crest; is that correct?

A. I would not testify to it; no, sir, because it all has been since I have given up my responsibilities.

Q. You recognize, though, Mr. Rodgers, that the obligation of Loew's Incorporated is to license its product theatre-by-theatre?

A. Oh, my, yes; and we do.

Q. And, consequently, the fact that some other theatre other than the Crest, located outside of the downtown area, might come along and equally seek access to its product, has no real bearing or ultimate bearing on the right to be [1354] accorded the Crest as such, to the right to have access to your pictures?

A. None whatsoever, except, morally, I would feel obligated, if I was in the chair of general sales manager, and had granted such a request to the Crest, and someone else asked me, from another section of Baltimore, I would have to think a little fast to be able to deny it.

Q. But each theatre must stand on its own merits?

A. Definitely.

Q. The practice of Loew's Incorporated with regard to the licensing of its pictures, which you have referred to, the preference for the downtown outlet, is a practice that has existed for many, many years; is that right?

A. As far back as I can recall; yes.

Q. Are you familiar with the fact that Loew's Incorporated, in answering interrogatories addressed to it by the plaintiff in this case, stated as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre."



[1355] A. That is the intent and the object of our company; yes, sir.

Q. And that represents a long-standing policy of Loew's Incorporated?

A. I would say so, with minor exceptions, in small towns, but nothing like Baltimore, except on the two exceptions I made.

Q. Within your own experience, Mr. Rodgers, would you say that policy is also the policy that has been followed and practiced by the other distributors?

A. That, I could not answer, because I could not attempt—it is all I can do to follow my own business, and I don't know exactly what other companies do. I do know our own case. There were times when we might have played day and date a picture here and there in two downtown theatres, but we abandoned that many years ago.

Q. And, from your own statement addressed to Mr. Raftery, and to the Court here, with regard to the way in which this plan has grown up over the years in the entertainment industry, you know, do you not, that the product of all these companies is habitually licensed for first run exhibition in theatres in the downtown areas?

A. That would be the general objective; yes, I should think so.

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#### COLLOQUY RE PARAMOUNT CASE.

[1378] THE COURT:—Oh, well, I am not talking about time element now; I am just asking you whether these questions are not involved. One of the arguments of the plaintiff is that, the basic argument, is that the jury should infer, and the plaintiff wants me to instruct the jury that they should consider whether, even though there is not only no admission of any getting together, nevertheless, the uniformity of their conduct may amount to a getting together, and the clearances are involved. I am just trying to see whether—in a minute, I will make my point a little clearer, but I just wanted to see whether you are not forced to agree that,

broadly speaking, those four statements are statements of questions that are involved in both cases.

\* \* \* \* \*

[1398] THE COURT:—It is a reasonable inference, from the uniformity of performance on the part of all the defendants in the way they act as to the downtown theatres *versus* neighborhood theatres, and with respect to first-run pictures, day and date pictures. From that conduct may be inferred an agreement in restraint of trade. Now, I am not saying whether that is right or not, or whether the jury will be impressed with it, but that is his theory of the case.

\* \* \* \* \*

[1406] THE COURT:—Well, I think you cannot go that far, but I think that the plaintiff is entitled to a reasonably broad construction of this very clumsy language of the statute, in view of the very broad nature of the Paramount decision and the decrees which have followed from it.

Now, it seems to me that if Mr. Rome is correct in his construction here of this clumsy language, or at least inadequate, inartistic language in the statute, it means this, that if the Government were prosecuting the defendants at the present time with respect to this period which is here in question, and could show that there was a conspiracy—of course you have got to show that, that is basic, and the absolute condition precedent—and could show that whereas in the Paramount decision and decrees first run requirements or failure to give first run certain clearance, all of those things were involved, if they could show that what was being [1407] done or had been done during the period that is here in question, was actually done with intent to monopolize the theatre business, then I think that is all the Government would need to do, the parties would be estopped from saying that they have not been ordered to refrain from that kind of thing by the Paramount decree.

That is your contention, isn't it, Mr. Rome?

MR. ROME:—Yes, sir.

THE COURT:—If that is true, it seems to me under the

language of the statute I have got to give the plaintiff the right to call the jury's attention to this decree and state that it is prima facie evidence, explaining that even though it is prima facie evidence it does not amount to anything, it has not force, no probative value unless they find a concert of action and unless they find that the adoption of this first run method and any other clearances involved were unreasonable under the given circumstances.

Now, that is all it comes down to, and it seems to me that the Court is required to let the jury have that decree before them with that explanation, just as Judge Chestnut had it before him when he considered the Windsor case.

Now, that seems to me that I am required to do that. We may call it a close case in view of the fact we are dealing with the case which arose without doing as Mr. Rome points out. I cannot exclude this, it is in the case, that [1406] one or more of the defendants' witnesses say this is a long practice and that antedated the decree. He also points out that the Crest Theatre was actually set up and correspondence had with respect to getting first run before the final decrees in the Paramount case were signed. All of those things seem to me to bring out the provisions of Section 5 of the Act. It may be a twilight zone case, but I feel that I should acquaint them of that.

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#### ARGUMENT OF COUNSEL RE REQUESTS.

[1432] MR. RAFTERY:—Number 6 strikes us, Mr. Rome, as simply being an abstract statement of law. It is not anything that will be helpful to the jury.

THE COURT:—Probably not.

MR. ROME:—Sir, with regard to that, I think it is of moment because there has been language coming from my friends on the other side during the course of the case with regard to questions directed to their witnesses: "Did you ever agree?" "Did you have any consultation or anything of the kind?" [1433] And, of course, as Your Honor knows, the burden of proof with regard to establishing conspiracy has been considerably lightened now, and it doesn't have to



have actual agreement or simultaneous action, and it was to that end that this No. 6 was directed.

**THE COURT:**—I will give some word of explanation to that.

Now, turning to 10, I don't think 10 or 11 or 12 are appropriate as worded, to be granted. The defendants in this case have the burden of attempting to explain away inferences of conspiracy, which the Court says you may infer from a uniform course of conduct. That is a construction, in condemnation of the defendants' right away, running all through this, it seems to me, a great many of these, Mr. Rome, are, it seems to me, condemning the defendants and exonerating the plaintiff. I have put this all in a very neutral way.

The defendants, you do not need to have direct proof of the conspiracy if you find that there has been a concert of action. We believe you will find that from a uniform course of conduct, something like that.

[1434] Then, 11, "The uniformity of policy on the part of Defendants in this case of first unanimously denying the Plaintiff access to first-run motion pictures, even though Plaintiff," and so forth. Is evidence which supports strongly the inference of concert of action.

I won't go that far. I will tell them they must weigh all the facts and circumstances and then determine whether or not they think any uniformity they might find is indicative of concert of action.

**MR. ROME:**—I understand Your Honor with regard to No. 10, Your Honor will not—

**THE COURT:**—I am not suggesting that, no.

**MR. ROME:**—What I had in mind is the problem of the burden being upon the Defendants of explaining it. I have no insistence upon the language as such.

**THE COURT:**—I think all that is to be said on that point is that you may infer from that, from such uniformity of action you may find that that indicates concert of action. If that action is in restraint of trade, as I will define that to you, then you will find the Plaintiffs made out a case of conspiracy. I think these are too disjointed.

Take 12, "The past proclivity of these Defendants to unlawful conduct violating the anti-trust laws, as found by the Supreme Court of the United States in an action brought by the Government, may be considered by you in reaching your decision in the present case since the conspiracy charged [1435] by the Plaintiff here is identical in scope and nature to one of the conspiracies, the existence of which was condemned by the Supreme Court."

I will not grant that. I have explained how I am going to explain the Paramount case, but I will not explain it in that language, because I do not think that is sufficient. I am going to explain what the broad issues were, as you have them on the brief, with a slight amendment, and use that as an explanation.

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[1436] THE COURT:—We are now down to 13. "The words 'restraint of trade' in the Sherman Act are to be construed as including 'restraint of competition.' The requirement of the law as established by the Congress is full, free and untrammelled competition in all branches of interstate commerce in order to secure equality of opportunity."

That may be a little broad.

MR. RAFFERTY:—The sentence ended "in all branches of interstate commerce in order to secure equality of opportunity." It may come within the cases. You see, practically all of these are actions in which the United [1437] States of America was a party, with the exception of the Goldman case, which we are not in accord with, I assure you, but the first four are all Government cases where the Government is seeking to protect the public.

MR. ROME:—Mr. Rafferty may not be in accord with the Goldman case, sir, but all these defendants here sought *certiorari* from the Supreme Court, which was denied, and that case included the words "in order to secure equality of opportunity."

THE COURT:—What case is that taken out of?

MR. ROME:—The Goldman case, the last one, 150 Fed.

2d, 738, 744. That is the case in which Judge Parker, of the Fourth Circuit sat.

MR. RAFTERY:—"In order to secure equality of opportunity." That isn't the purpose of the Sherman Act. You are completely eliminating the individual. You may have a man who is a great genius and a man who is a bad businessman.

THE COURT:—I think it is misleading.

MR. ROME:—Sir, I would like to press that, "equality of opportunity" is at the heart of this case. The Crest Theatre was asking for equality of opportunity in getting access to first run pictures.

THE COURT:—If you stop there I do not think that is a fair statement, because there are other circumstances which may justify their not being given that opportunity. [1438] It is like saying that the Declaration of Independence, "all men are declared to be free and equal," but what do you mean by that? They really aren't. They start with an opportunity, but there may be conditions which interfere with their becoming free and equal. And you have that situation possibly here. I am not blaming you gentlemen but it is very difficult for the Court, I find, sitting with the jury, to make it clear to counsel that while the Court does not disagree with a lot of requested instructions, it does not feel that it is necessary to give them everything you request, because they are disjoined from explanation and understanding alone, they are probably not sufficient. So, I think the best way is for me to point out wherein I am going to grant substantially what you ask, and wherein I do not feel I can grant any one or more of the instructions, and then leave it to you to seize the opportunity after I have made the charge, to object to it and ask me further to clarify it. Otherwise, we would have to go into a committee on style in order to get any agreement on prayers.

Now, No. 14. That is an example of what I said. I think that that, while it is all right, but when it sticks out like a sore thumb, it is not further explained. "The public interest is as much concerned with the improper control of



the interstate market for the single city of Baltimore as for the country as a whole."

[1439] The public interest here is not involved except as the Supreme Court has said A must not treat B in a way which is contrary to public interest. This reads more like a criminal docket.

No. 15. I think No. 15, as a bald statement, is all right.

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[1439] THE COURT:—17. I do not think it should be granted.

[1440] Now, I say that for the reason that the second sentence is more an argument on behalf of Plaintiff. "No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants."

It stops there because "a fair opportunity" has to be defined so carefully by other things that the Court has to say that I do not think any such instruction like that ought to be granted by itself.

Then similarly 18, "Under all the evidence in this case you may conclude that the Plaintiff's Crest Theater has all of the necessary qualifications, including size and equipment."

Mr. Rome, I think you sort of misconceive the function of a judge in his instructions to the jury. If I were going to give them a running narrative of this whole case, which I do not intend to do, and this would tie in some further discussion of the picture, and so forth, that may be all right, but it is up to the jury to determine whether it is entitled, by reason of all these things, to have first run pictures.

MR. ROME:—That is right, I agree with that, sir. What that request was designed to do was to point out to them their function with regard to that fact and that they could conclude—

[1441] THE COURT:—I will state it a little differently.

19, I think, is all right.

MR. RAPTERTY:—Before you leave 18, Your Honor, the

word "location" is one of the most controversial facts in the case. We have submitted some requests based on it. I think practically every witness of importance called by the Defendants told what a terrible location the Plaintiff's theater had, and that was one of the primary reasons for not licensing pictures out there.

THE COURT:—Well, I think 19 is all right. There is not only one factor, but it is the important factor.

MR. RAFTERY:—That is the point. These reasons, to minimize the importance of location, while not important as expressed in the evidence, is mentioned because of its terrible location and its short drawing.

THE COURT:—I think, as I pointed out, running all through these, it is perhaps an unconscious turn on the part of Mr. Rome to write another brief for Plaintiff. I find that in the Defendants' instructions, too.

MR. RAFTERY:—Is it not when in Rome, do as the Romans do?

THE COURT:—No. 20. There is a definite instruction. I cannot give that. "Under all the evidence in this case you must conclude that the Plaintiff has made sufficient efforts to obtain first-run feature motion pictures from the [1442] Defendants."

I cannot tell them that the Plaintiff has. Maybe they will think the Plaintiff has. That is a factual question.

21. I think 21 is substantially all right. I shall not use exactly the same words.

I think 22 is all right. However, instead of saying that it would also be proper, it is your duty to consider. Well, "You are also to consider."

MR. RAFTERY:—Well, of course, that thing is so contrary to the facts. I think Your Honor has got a question of fact to submit in this morning's exhibit which Your Honor contributed so much to, 63 per cent of the first run features shown downtown Baltimore were shown in independent theaters as against 37 in theaters owned by distributors. Now, we think a construction on that fact for the jury, instead of saying that these companies like Universal, Columbia and

United Artists, who own no theaters anywhere, would be influenced—"to unlawfully favor the theater of Defendants in a situation such as Baltimore" when the evidence is over here on the board.

[1443] THE COURT:—Well, I think I will say they are to consider the chart, giving something like 22, and then telling them to look at the chart.

MR. ROME:—The reason for these points, it is based on the evidence in the record, that these theatre-owning defendants deal with the non-owning defendants throughout the country, and consequently it is not only Baltimore to be considered, but the fact that these people seek and get advantage throughout the rest of the country. The mere fact that there are only two distributors owning theatres in the City of Baltimore is of no moment. For instance, in the other case, there was no evidence that a distributor owned a theatre in the area involved.

MR. RAFTERY:—The Milgram case is an interesting thing. Mr. Rome, in his statement, reiterates the Milgram case, but Mr. Rome and his firm represented these theatre folks up there, and was practically on the same side as the defendants; and here he is arguing that Milgram case is a strong case.

I say that "22" is a wholly improper, and an instruction should be based on the evidence as it applies to Baltimore only. We are not interested in discriminations out in Pittsburgh, if there are any. It is Baltimore. Nor is there any evidence in this record on these discriminations as to any place, not even Baltimore, but what we think, and [1444] I agree with Your Honor a hundred per cent, it is impossible, when you take these little paragraphs, without having them in a narrative, like a charge usually is,—and I am only warning Your Honor that it is our contention, and I think we have proved it, that Baltimore is the only place where we have an issue; and the overwhelming weight of the evidence is that the independent theatres get just the same treatment as the others.

THE COURT:—I think it is proper. It is in the case.



A great many of these defendants, being nationwide in their distribution and production, I think something substantially equivalent to that, but not quite in that language, is proper.

I think "23" also is substantially all right.

I am hurrying through these, because it is getting very late. I assume you have read them over, as I have. I would not be doing this if I had not studied them carefully. Of course, I have forgotten a few of the items. I haven't made notes of all of the things.

I think No. 24——

MR. RAFTERY:—No. 23, there is no evidence at all here—in the last sentence on the top of the page—I have no quarrel with the first sentence.

MR. ROME:—It is a statement of the plaintiff's claim, sir.  
[1445] THE COURT:—I don't think that is improper. I do not say that I will put it that way, but it is a correct statement, I think, of one of the plaintiff's claims.

MR. RAFTERY:—The evidence that is in the record is all on the chart. The only first-run pictures, 75 per cent of the playing time at the Stanley was consumed by Warner pictures which, Your Honor, as I pointed out, we had a perfect right to do. The balance of the time was used up in 18 Paramount pictures, and there are only two other pictures played during that period. In other words, he has no complaint that we have favored the Stanley Theatre.

THE COURT:—This claim may be entirely without any support in the evidence, but it is just a claim he makes, and that is what he has made. I don't think we have time to go into whether or not it is a sound claim, Mr. Raftery.

"24", I think, is a substantially correct statement. I won't give it all in that language. It relates to the alleged conspiracy.

MR. RAFTERY:—But what he is saying here is that there is some evidence to the effect that Warner Bros. Circuit Management, and Stanley, and Loew's at the Century, had a substantially better opportunity to obtain product than the opportunity afforded the plaintiff. I do not just see that,—no evidence.

THE COURT:—"25" is an attempted statement of the [1446] law. I do not think it is incorrect. Similarly, "26".

MR. RAFTERY:—I will tell you where it is wholly incorrect. No. 25 says, "a union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first-run may constitute a violation of the antitrust laws". Every contract a distributor makes with an exhibitor for the exhibition of a picture on any run restrains trade.

THE COURT:—They say it may constitute a violation.

MR. RAFTERY:—Oh, well, there is no one who has ever held that the making of one contract between a supplier and a user—

—THE COURT:—It doesn't say "one contract".

MR. RAFTERY:—That is what he says here,—“a union or combination”. Q

THE COURT:—And he is not talking about one contract. He is using it in a general sense.

MR. RAFTERY:—And it further in no way protects Warner's absolute right to sell their own theatre.

MR. ROME:—I want to address myself to that, because there is no absolute right on the part of Warner's to sell their own theatre. That came up once before, and I attempted to point out that, although there is language in the decree that must be read in the light of the earlier [1447] mandatory language, that these defendants are enjoined from setting clearance for theatres not in competition—we claim the Crest is not in competition, it is so far away, that it is capable of playing day and date. It is a question for the jury. They have no absolute right to put their own pictures into their own theatres; and, as a matter of fact, these defendants have testified that recently, at any rate, in Baltimore, Loew's pictures and Warner's pictures, at least Loew's pictures, are going to other theatres than to the Century Theatre.

THE COURT:—As I understand, they have an absolute right only to put it in their own theatres—or, I will strike that out, and put it this way: A, if B has his own theatre

in Baltimore, can put his own pictures only in his own theatres if he keeps them there; but if he starts putting them out to C's theatre, and to D's, and to E's, then he has to be careful lest he is not also affording F's theatre the same treatment, if it can be shown that F is on a parity with C, D and E. That is the law.

MR. ROME:—I would agree with everything Your Honor said, except the very first portion, which says A can put his own pictures in his own theatre. That is all right, if A is enjoined from granting any clearance to any theatres not in substantial competition. If it is the Century Theatre, if it is not in substantial competition [1448] with the Crest, then Loew's has no absolute right.

THE COURT:—You have to show me—I haven't read anything in a case which says, if I have a theatre, or motion picture theatre in Baltimore, and I have my own pictures in my own theatre, I just cannot take them there?

MR. ROME:—That is taken from the provisions of the decree, itself.

THE COURT:—That is all tied up with the other situations. They say you cannot do it, because it appears that you are not confining it just to them, or that you are in conspiracy. You are helping others who are not confined to just that. That is my understanding of the law. I do not find anything in any accredited case that says that a man—that would be just taking a man's property away from him.

MR. ROME:—I don't mean to pretend, Your Honor, that that would be the net effect of the thing, but that is one of the reasons why these defendants were required to give up their exhibition business and to separate it from production and distribution.

THE COURT:—That was because they were all in concerted action. But, in the case I have put, do you mean to say that if you have a theatre in Baltimore, or Buffalo, or anywhere else, and you have what you think are a lot of good pictures for your own theatre, that the Paramount case says [1449] you cannot play them except in your own theatre?



MR. ROME:—I respectfully submit, sir, that the Paramount case says it as to these defendants, because it is a punishment put on them for their violation of the law.

THE COURT:—But I am not going to give an instruction which does not make it clear that if the practice, if exercised, is devoid of any conspiracy to hurt the Crest Theatre, if it is devoid of that, they could do that all they wanted. That is all this amounts to. I am not going to confuse the jury with a lot of refinements of the law that do not have any application.

What number are we to, now?

MR. RAFTERY:—No. 26, Your Honor. It only suggests that you may not—this wholly illustrates three phases of the antitrust laws; and, in our Instructions 3, 4, 13, and 14, if read in conjunction with this, you may be able to get something out of it.

THE COURT:—No. 27, I think, will not be granted.

MR. ROME:—May I respectfully suggest that one of the things that has been amply borne out by the testimony in this case is that all the defendant-distributors have a policy applicable not only to Baltimore but anywhere throughout the country.

THE COURT:—Well, Mr. Rome, I think all I can say is, as I read this as it stands, what you have given me as an [1450] instruction, it is incomplete and not sufficiently accurate, standing by itself; and that is why I have marked it as one I will not grant. The principle which I understand you are trying to bring out, I will try to develop in other language.

MR. ROME:—Thank you.

THE COURT:—No. 28.

MR. RAFTERY:—That is something they have up in the 3rd Circuit. We object to that. There is no evidence here of any kind on that.

THE COURT:—I think there is evidence. That question was asked of two or three witnesses. I am sure it was asked. They had knowledge. They must have had it.

MR. RAFTERY:—No, sir; a flat denial.

MR. ROME:—I submit, and I can point out in the record, that these defendants testified they knew of the existence on the part of all the theatre-owning defendants to license their pictures for exhibition in the downtown houses.

THE COURT:—I think it would be rather absurd if they did not. They would not be on the job if they did not.

MR. RAFTERY:—All of them testified about the preferred way of distributing pictures, to get first-run downtown, and that they knew, generally, everybody in the business preferred it. It is an economic simple axiom.

MR. ROME:—You claim it was denied?

[1451] MR. RAFTERY:—In the form you have put it here.

THE COURT:—That is just a restatement of one of the issues, No. 29.

MR. RAFTERY:—No. 29, we object to that.

THE COURT:—Yes; I will not grant it in that fashion. Nor will I grant No. 30.

MR. ROME:—As to No. 30, the evidence is that all of the defendants did deny first-run, and they granted the first-subsequent-run, which resulted in the—

THE COURT:—It is more than that. This reads as though that was the first and original and continuous manner in which they got around granting it, when the defendants' testimony is that they simply had never done it anywhere before, under like circumstances, and that they did not do it for the Crest, and they gave what they thought they were entitled to give in relation to all of the circumstances.

Now, my difficulty with a lot of these requested instructions is the manner in which they are phrased; and you will have to leave it to me. Of course, you do not have to accept as correct what I do; but if we didn't treat it this way, I would have to ask counsel to write my charge for me.

Now, the rules do require—and, I think, properly—that the Court shall tell counsel what it intends to do in the way of instructions, and give them a reasonable [1452] opportunity to object; but we cannot have the objections so minute and meticulous that we will spend hours over it, when you have a right to bring these points up, if you are not satisfied with what I put in.

In other words, to add to what I have said, I probably will not give instructions on a number of what I call the minutiae of the case, and you have a right to object to that. I probably will still feel that it is unnecessary for me to put them in, to tell the jury about them; but you have a right to enumerate them; and, if I won't put them in, to take exception. But that remains to be seen, after I have delivered my instructions. And what I said, therefore, applies to Nos. 31 and 32.

In No. 32, there is no substantial competition between the plaintiff Crest and the first-run. That is a basic question of fact in the case.

No. 33, the mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres, and so forth, has no bearing on the real issue in this case, which is whether a general system of clearance, uniform in that if carried out, and so forth, is a lawful restraint upon commerce. You have evidently taken pieces of very good English language, out of cases that may be very sound. But I just cannot put that into my instructions.

[1453] Well, I think No. 34 is sort of an essay, and I am not disposed to grant that.

Of course, No. 35:—"The president of the plaintiff corporation who was the active operating executive managing the Crest Theatre \* \* \*"—I do not instruct a jury as to the financial responsibility, or anything else, about the plaintiff or defendant. It is for the jury to consider all of those factors. That is all I tell them about the plaintiff's or defendants' position.

[1457] Now, No. 40.

MR. RAFTERY:—No. 40, if you read it literally, he is asking you to direct a verdict and tell the jury to go out and estimate the damage.

THE COURT:—I think that is too broad.

MR. ROME:—Sir, I do not want to labor the point, in view of Your Honor's indicated ruling on the thing, but it



has never been our intention to ask for such a point until the testimony in the case from these defendants developed in the manner it did; and it is because of the fact that every one of them has admitted to the existence of a national policy, and they knew of the policy over a number of years. [1458] THE COURT:—You are asking for a directed verdict, now.

MR. ROME:—I think the testimony in this case can properly support it.

THE COURT:—I cannot grant it.

Now, No. 41.

MR. RAFTERY:—And that is another statement—

THE COURT:—That is not sufficiently extensive. I have already covered that. I have also covered No. 42.

Now, on No. 43; I would not grant that in that language, because, again, it is in effect—it is worded too much in favor of one side.

Now, No. 44.

MR. RAFTERY:—That is another directed verdict. You must reach a verdict for the plaintiff—

MR. BERENHOLTZ:—If you find—

THE COURT:—Well, I think, if Mr. Rome means that the plaintiff must receive the verdict, if the jury finds what is said in the first part of "44", plus the other factors which are necessary to find, and that it was done by a concerted action—

MR. ROME:—That is included in the very last wording of No. 44.

MR. RAFTERY:—No. The joker in that is: "conscious parallel action". That is a 3rd Circuit term not recognized [1459] generally in this Circuit. However, the main objection, if you look to the second line: "was fairly entitled"—under our system, that is not the antitrust law.

We submit, Your Honor, if you will look and make a note to look at our 12th, 13th and 14th instructions which we have prepared and set forth, we think that is the instruction the Court should give.

THE COURT:—Very well.

MR. ROME:—Sir, Mr. Raftery keeps deriding the 3rd Circuit rule on the “conscious parallelism”, but that language was based on the Milgram case, which was affirmed by the Circuit Court of Appeals for the 3rd Circuit; and, again, these gentlemen sought *certiorari* from the Supreme Court, raising that very point, and *certiorari* was denied.

MR. RAFTERY:—Judge Chesnut, in the Windsor and Walbrook cases, affirmed in this Circuit, are entirely different on that point.

MR. ROME:—On the contrary, there is no difference between Judge Chesnut's ruling and the ruling in the 3rd Circuit.

THE COURT:—I think we can speed up here a little. I have read carefully, before the hearing today, Nos. 45, 46, 47, 48, 49 and 50, and I think all of them are, as stated, not appropriate to be granted. They may express something, some points which I think, if they had not been [1460] covered by other prayers we have gone over, I think they are probably appropriate, and they are sort of double-talk on what we have been over, and I think it would be futile to take them up one-for-one.

Now, No. 51.

MR. RAFTERY:—That is equally bad. I know Your Honor is going to charge the jury as to the credibility of witnesses, and the weight to be given.

THE COURT:—I think they suggested too much.

MR. RAFTERY:—They single it out. It is a sore thumb, and is contrary to the facts put in evidence.

THE COURT:—No. 52, I think is likewise too isolated and broad.

MR. ROME:—Excuse my interruption, but may I go back one minute to No. 48: That, in our minds, has importance by reason of the fact that it states something which has not been referred to elsewhere, and that is where the restraint of trade results, the fact that these defendants came along and denied that they intended a restraint of trade, and deny that they intended to enter into a conspiracy, is of no moment if, in fact, the restraint does result.

MR. RAFTERY:—That is not the law. The law is simply, if restraint results, as the result of a conspiracy, you may violate the Sherman Act.

[1461] THE COURT:—I think it could be covered by telling the jury that they had to take into account the testimony on both sides.

MR. ROME:—Excuse me. I think it goes a little beyond that. As Your Honor has stated, if restraint does result, I think the jury is properly to be instructed that they may disregard the protestations of the defendants that they did not intend to conspire.

THE COURT:—You think it is sort of like the case of crossing-accidents, where the testimony is the man said he did not see the train, and the weight of the testimony was that it was two yards away from him. I do not think that is this case. I think, where there is a contradiction in the testimony, all the Court can do or say is, "Who do you believe is telling the truth?"

MR. ROME:—I was relying on the last sentence, which says the ordinary rule of law applies here,—“You may disregard such testimony, because persons must be held to have intended the necessary and direct consequence of their acts, and cannot be heard to say the contrary.”

THE COURT:—I am not sure that that is the situation here.

Now, I am down through No. 52. No. 53, the same reasons, I think, apply.

Nos. 54, 55. No. 56 is all right. It is a very [1462] broad statement.

MR. RAFTERY:—I think we might be able to cure the badness in it, if at the end of the subject it was inserted: “on some run”. In other words, when a man owns a theatre, he has the right to expect some pictures.

THE COURT:—I think it is rather broad.

MR. RAFTERY:—If you add the words, “on some run”, it does not mean he is entitled to first, second or tenth run, but he is entitled to get some pictures.

THE COURT:—Yes. I think No. 57 is all right. Of



course, again, it has to be taken in the light of the rest of the instructions about what is restraint of trade.

MR. RAFTERY:—The thing that is bad in that, is the fifth line, "an arbitrary system of clearances". What he is trying to say is whether it is created as part of a conspiracy.

THE COURT:—Yes.

MR. RAFTERY:—That is the test. Someone may think it is arbitrary, and, if done separately and individually, it is not violative of any law.

[1463] THE COURT:—I think No. 59 cannot be granted, as written,—“Where a number of motion picture distributors engage in a consistent course of conduct directed toward a common end, it may be presumed that they do so as a result of a tacit or explicit agreement or understanding between themselves”. We have already been over that point. I have already said how I am going to cover that.

No. 60, I think is probably substantially correct. “The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not prevent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act”.

MR. RAFTERY:—That is a point. As written now, you cannot follow it.

[1464] THE COURT:—No. 61, I think, should not be granted.

MR. ROME:—Sir, that has been one of the reasons given, for instance, Fox in this case, in its answer to interrogatories, said they would not give the Crest access to pictures, because they had a satisfactory customer.

MR. RAFTERY:—Downtown.

MR. ROME:—Downtown. And that has also been in evidence from some of the other defendants, and I think the jury should be instructed, Your Honor, that that policy of preferring customers has been used by these defendants in the past.

THE COURT:—You can argue that, but I do not think I am going to give you that in the instructions.

MR. RAFTERY:—Windsor and Walbrook support Your Honor in that position. It is 4th Circuit law.

THE COURT:—I think No. 62 is a correct statement of the law. I do not know that I have to give them that, in this case.

MR. RAFTERY:—That is contradicted in the Dipson case, and contradicted in the right of Loew's and Warner's to license their own pictures to their own theatres. He is trying to say it is a conspiracy, if Warner licenses its pictures to the Stanley Theatre.

THE COURT:—You may have such a thing.

MR. RAFTERY:—I do think, under Section 5, [1465] which Mr. Boyd read to Your Honor, that decree gives Metro or Loew's the absolute right, without restriction, for a 3-year period to license their own pictures to their own theatres, irrespective of the decree. Warner's has the same right, under the next section; and what he is trying to do is overcome that by saying you can have a combination and conspiracy, if that is all you have. In other words, they lead up to the—

THE COURT:—I do not think it is sufficiently descriptive. Similarly, I do not think No. 63 can be granted, because that, Mr. Rome, again, does not take into account the right of the other side with respect to first-run, and whether this is competition or not. It is not adequate, and it is too incomplete.

MR. ROME:—All this point has to do with is getting access to product. Here, the defendants, as we see it, and it is our contention, have denied access to product.

THE COURT:—I cannot grant it in that shape.  
Now, nor 64, nor 65, nor 66.

I think No. 67 is substantially all right.

MR. RAFTERY:—We have stated that accurately in our No. 40. If you put a note on No. 40, the second sentence, for instance, if he stopped right after the first sentence, there would not be any quarrel with him. He is asking you to tell the jury they are to divide by 3, and a [1466] lot of other

stuff. Then he has this stuff about the will of Congress concerning the punishment of those who are guilty of violating the law.

MR. ROME:—I appreciate Mr. Rastery's tremolo, but I suggest that that is exactly the net effect of this text there. There is no dispute about the fact that the trebling of damages is punishment.

THE COURT:—I think it is substantially correct.

Now, I do not want to shorten the discussion unduly on the rest of these, but my study of them yesterday indicates to me, for substantially the same reasons which I have already announced in rejecting so many of the requested prayers, and for these same reasons, all of these from No. 68 on to the end, appear to me either to be superfluous or incomplete, or have already been covered.

MR. ROME:—Sir, I would ask Your Honor to consider those points which have to do with the Paramount case. I have attempted to frame points here that would embody to the best of my poor ability, sir, the kind of thing I contemplate is meant by the Emich case, with regard to instructing the jury as to the net effect of the Paramount case, and we have attempted in this relatively small number of points to set forth the fact that these defendants have had certain things adjudicated against them in the Paramount case.

THE COURT:—I am going to try to cover that very [1467] much more briefly, when you introduce the decrees, and in a brief statement in my charge, and if you do not think that covers it, you can object.

#### DEFENDANTS' REQUESTS.

[1471] THE COURT:—I think No. 14 is substantially all right.

MR. ROME:—There is one point with regard to No. 14, and that is the definition which is pointed out again in the Milgram case, where these defendants have a common problem, and meet it locally, in the same way. That is one thing. But where they erect or acquiesce in a national policy, which is applicable throughout the country, that is different; and the very fact that here, where they have an admitted policy



engaged in by these defendants everywhere throughout the country, that makes it a different situation.

THE COURT:—Gentlemen, you will have to leave it to me to see whether I put that properly.

\* \* \* \* \*

[1475] No. 21, I think, is correct.

MR. ROME:—There, they are limiting the element of proof to direct proof only, and excluding circumstantial evidence. They say, "If you find from the evidence that there is no direct proof". We do not have to have direct proof.

THE COURT:—I think they are right, there.

MR. RAFTERY:—I am willing to cross out the word "direct", and add the word "sufficient", and make it read, "If there is no sufficient proof".

THE COURT:—I think you are right, on that.

I think No. 22 is correct. Part of it is quoted right out of—

MR. ROME:—The only point I would ask Your Honor to include with regard to that, is that the plaintiff is entitled to opportunity, along with other exhibitors, and that the defendants cannot conspire to exclude the plaintiff from access to the proper run.

THE COURT:—Well, I will try to cover that.

I think No. 23 is not properly grantable, as it stands.

MR. RAFTERY:—That is the wording in the Westway [1476] case, and was affirmed as late as 1951, in the Fanchon-Marco case, that any distributor acting independently, and not in concert or conspiracy, has the right to select its own customer. The Windsor case said it again, in this Circuit, and it is a fundamental thing in ordinary American business. Everybody who deals in exclusive articles, like an automobile dealer, or Johnson & Murphy shoes, may select a given customer in an area, and that is it. And we say, we can, if we act separately and independently, we can elect to sell our pictures to any theatre, providing we do not combine or conspire with anybody.

THE COURT:—I think the same applies to No. 24. "If

you find from the evidence that each of the defendants in licensing its pictures for first-run exhibition in Baltimore endeavored to select that customer which would ultimately yield it the greatest revenue, having due regard for its past business relations with the customer, the skill and character of management of the theatre, the size, location, equipment and drawing power of the theatre, then you should find for the defendants on the first cause of action."

MR. RAFTERY:—I think that is absolutely correct.

MR. ROME:—There should be added, with regard to No. 23, that, morally, there is no duty on the defendants—excuse me, there is a duty on the defendants to treat all exhibitors fairly, and that the exhibitors have a right to [1477] equality of opportunity in access to run.

THE COURT:—That will be covered by other parts of the charge.

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[1478] MR. ROME:—I was attempting to inquire whether Your Honor was taking the position that even though the Crest Theatre was not in substantial competition with Loew's Century Theatre, or Warner's Stanley Theatre, that, nevertheless, it would not have the right to have access to product day and date with those two companies?

THE COURT:—I think that is the law; yes.

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[1570] THE COURT:—Gentlemen, I have given some further consideration to the question of burden of proof, and as a practical matter it probably becomes somewhat academic. I want to do my best to give the right instructions with respect to it, and I have attempted to outline what I think is the correct way to tell the jury the situation or the status of the pleas in the Paramount case in this case, and in that connection I think it is appropriate to make it very clear to the jury what is the correct interpretation that they must give, or what they must find with respect to the burden of proof, that is, upon which side it rests and when.

From a further consideration of the matter, I am dis-

posed to the view that plaintiff's counsel is correct in saying that there is a separation of the burden of proof, that there are two phases of it, and when it comes to the matter of clearances, the burden of proof is upon the defendants; but, of course, the basic burden of proof, that is to include conspiracy in restraint of interstate commerce, rests throughout the trial upon the plaintiff.

I think, Mr. Rome, that is what you have been contending for?

[1571] MR. ROME:—It is exactly that, sir. Thank you.

THE COURT:—I think the contrary position is tenable, and as you know, I thought so from the first, and I think it is very plausible to say that the language in that section of the decree, or one of the decrees which talks about the burden with respect to clearances being upon the distributors, it is quite plausible to say that that relates to a situation such as we have in the decree, because in that decree they are talking about a past event, that where there has been an allegation or a representation that the decree has been violated, that is to say, where the parties are in contempt of the order, then the burden of proving the reasonable-clearance, as set forth in the order, has been shifted to the distributors. But I think, perhaps, a more reasonable interpretation is to say that that is not only, of course, true with respect to the Paramount situation, but where you are required or permitted, or where plaintiff is allowed to use the Paramount decree as *prima facie* evidence in a case of the present kind, it seems to me to make more sense, to be more reasonable to say that if there is conspiracy to restrain trade unreasonably, that is restraint of interstate commerce, as I shall attempt to define it in the rest of my charge. I think it is more reasonable to say, then, that the plaintiff should have the benefit of the broader interpretation of that language about the shifting [1572] of the burden of proof.

[1611] MR. BOYD:—Now, one more thing: the very first paper in this case, in this file of documents, the official papers in the case, is the bill of complaint. You will find



that it was filed in the District Court of the United States for the Eastern District of Pennsylvania, at least the District Court in Philadelphia.

I do not challenge the plaintiff's right to file his case in Philadelphia, whatever. Whatever reasons he may have had, he had the right to file a suit there, whether it was because he thought distance might lend enchantment to his theatre, and it was better for a Philadelphia jury to pass on this, or for whatever reason he had to do it, and I don't challenge it; but there happens to be a further rule that was invoked in this case, and it was invoked by the defendants, that where the convenience of the parties and the interests of justice require, then the case can be sent from the court in which it was filed to some other District Court; and that is what happened in this case. And it happened in this case over the vigorous opposition of the plaintiff, and at the request of the defendants, their request that the case be sent here to Baltimore, to be tried, where they were perfectly willing to risk the disposition of this case to a Baltimore jury. And that is what I am quite willing to do.

\* \* \* \* \*

[1654] MR. ROME:—They have made mention of the fact in this case that it was filed in Philadelphia. It is perfectly true, this case was originally filed in Philadelphia; but I do think Mr. Boyd should in all fairness point out to you the fact that when this case was transferred down here from Philadelphia, the Court in its opinion ordering the transfer said there is very grave doubt that the case could ever have been brought originally in the City of Baltimore, because of the intricate details of jurisdiction. So that [1655] the curiosity of the law was, even though we could not start here originally, the Court in Philadelphia recognized that under a statute of Congress, it could be transferred here; and when it was transferred here, we came here, and never sought to appeal that order transferring it down here. And I should have supposed that ordinary fairness would have led Mr. Boyd to point that out to you, in discussing the problem at all.

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[1657] THE COURT:—Mr. Foreman and Members of the Jury, it now becomes the duty of the Court to instruct you on the law of this case. As you have learned from your experience in other cases, I think, you, as the jury, are the sole judges of the facts, and anything which the Court may say in the course of these instructions about the facts, or any inferences which it may draw or may appear to draw, also any remarks with respect to the facts which the Court may have made or any inferences which it may have drawn or may have appeared to draw in the course of the trial,—none of that is in any sense binding upon you. It is for you, and you solely, to determine the issues of fact, as you may find them, after applying the rules of law which the Court will give you, and which must govern you in the case. The rules and principles of law which the Court will give you are binding upon you.

This has been a somewhat protracted, and perhaps it has seemed a somewhat tedious case. Of course, all of us, at some time or another take delight in seeing a motion picture. So, perhaps it makes the minds a little more disturbed if we talk so much about motion pictures but do not have any display of them.

I think it is appropriate for the Court to say to you at the very outset,—because it should assist you in your application of the law to the facts as you may find them [1658] that there are really only three basic questions that you have to decide in this case, and they are the following,—this being, under the Anti-Trust laws of the United States, a charge of conspiracy by the defendants against the plaintiff. The first and most basic question is: has there been such a conspiracy? In a few moments I shall define conspiracy to you, and, of course, go into more detail by way of illustration of the principles of law as applied to the facts of the case, or some of them, at least. But that first and simply stated question, which you must bear in mind at the very outset, is: has there been a conspiracy against the plaintiff in the operation of its Crest Theatre?

If you should find, after applying the principles of law,

which I will give you in a moment, to the evidence as you find it, that there has been no conspiracy, then, that ends the case. So, there is only one question, then.

If, on the other hand, you should find that there has been a conspiracy, then you still have two questions to consider: (1) Even assuming that there has been a conspiracy, has it been the proximate cause of actual, and not merely speculative, damages to the plaintiff within the period here in suit, which is from February, 1949, until March, 1950? If you answer that second question that there has been actual, and not merely specu- [1659] lative, damages that plaintiff has proved as the proximate result of the conspiracy, the third and last question is: what is the amount of that damage that you find from the evidence?

Those are the three broad, basic, fundamental questions that underlie the case. They are not difficult, technical questions, as I trust you will see from the more detailed instructions that I will now give you in connection with explaining the law as you shall apply it to the facts. I shall not, in the course of these instructions, attempt to give you in any detail at all a narration of the facts. I may refer to certain parts of the testimony, certain of the facts that have been asserted by either side, or by both sides, which you may think are of minor importance, and they may be facts which, in your deliberations, you may think do not have as much weight as some other facts. I shall not in any way attempt to cover the testimony in the case, first, for the reason just explained, that, in any event, it would not be of any control upon you and you would not be required to adopt anything that the Court might say about the facts, or any inferences that the Court might draw, and, secondly, that being true, I think it would be tedious and unnecessarily wearisome to you for the Court to do so. You will have access to the transcript of the testimony, which has already been written [1660] up, if you want to refresh your recollection on it after you retire to your room. You will also have access to all of the exhibits, which you may peruse again as and when you may see fit to do so.



To be somewhat more specific with respect to these principles that must control you in considering these basic questions which you have for decision,—three at most,—I instruct you that this action is brought under the Anti-Trust laws of the United States, known as the Clayton Act and the Sherman Act, and is brought by plaintiff, a Maryland corporation, to recover damages, from eight defendant companies, under two causes of action, which plaintiff claims to have suffered during the period from February 26, 1949, the date of the opening of its, the Crest, theatre, up to March 20, 1950, the date of the filing of this suit, which was originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion, for convenience of the parties, such being permitted since the suit might have been brought originally in this Court.

The suit is based upon two causes of action, \$250,000 damages being claimed under the first cause of action, and \$52,000 under the second cause of action. The more precise grounds of these two causes of actions or claims I will explain to you in a moment.

[1961] Plaintiff also asks for a permanent injunction prohibiting such of the defendants as are engaged in the business of distributing motion pictures from imposing clearances on pictures in favor of theatres in downtown Baltimore over plaintiff's Crest Theatre, located in the northern part of the city, near the intersection of Reisterstown Road and Rogers Avenue.

I instruct you that the term "clearance", in the motion picture industry, means the period of time stipulated in license agreements, between distributors and exhibitors, which must elapse between showings or runs of the same picture within a particular area or in specified theatres. Plaintiff's complaint, that is, what the plaintiff claims here in his bill of complaint, alleges that the following seven defendants distribute motion pictures for exhibition in theatres in Baltimore City, namely, Paramount, Loew's, RKO, Fox, Universal, United Artists and Columbia; that the eighth defendant, Warner, operates the Stanley Theatre in down-

town Baltimore, and that defendant Loew's operates the Century and Valencia Theatres, also in downtown Baltimore, and that, in addition to these theatres in the downtown section of the city operating first run, there are five other downtown theatres, namely, Keiths, New, Mayfair, T., and Hippodrome, operated by persons or companies other than [1662] parties to this present suit.

Plaintiff is the operator of the Crest Theatre, as I have already said, located in the outer section or the northerly section of Baltimore, at or near the intersection of Reisterstown Road and Rogers Avenue. Plaintiff claims that this theatre is properly located and adequately equipped for exhibition of first-class motion pictures on first run; that it has attempted to obtain first run pictures for exhibition at the Crest, but that the defendants have failed and refused to license any pictures to it on first run, and that since February, 1949, it has been operated on first so-called neighborhood run,—that is, approximately 21 days after first run downtown Baltimore showing,—day and date with other suburban as well as neighborhood theatres, and that it has been discriminated against in licensing first neighborhood runs with respect to film rental.

As you have heard many times stated in the course of the testimony, these two expressions are very common in the motion picture industry,—“first run” and “day and date”. “First run” means just what it says in a few words. It is the first time the particular picture is shown. “Day and date” relates to a contemporaneous showing at the same time with one or more other showings somewhere else.

[1663] This suit was originally brought against ten companies, but two of them, Warner Bros. Pictures and Warner Bros. Circuit Management, are no longer involved in this proceeding. I mention that only parenthetically. You will see their names in the original pleadings. All eight defendants now involved in this case deny all of the allegations in plaintiff's complaint which in any way charges any wrongdoing on the part of any of the defendants.

As you have heard from the testimony, the Crest Theatre

is located about six and a half or seven and a half miles from the downtown theatres in Baltimore. However, in the immediate area of the Crest, at the time its construction began, there were a number of well-established neighborhood theatres, all of which plaintiff claims are in direct competition with its theatre, specifically, the Uptown, Avalon, Ambassador, Pikes, Forest, Gwynn, and Pimlico. When the Crest was completed, its builders leased it to Theatre Enterprises, Inc., which is the complaining company in the present case, that is, leased it on a month-to-month tenancy, which continued until some time in January, 1951, when the theatre was sold to the present plaintiff for approximately \$413,000.

Plaintiff contends, as you have seen, that the defendant distributors in the present case could have licensed pictures to play first run at the Crest on 21 days clearance [1664] over all of the theatres above mentioned, that the pictures, while playing at the Crest, could play first run in one of the seven downtown theatres above mentioned, and in many other theatres located in Baltimore City that are not situated in the immediate area of the Crest, specifically, theatres like the Senator, Belvedere, Northwood, Edmondson Village, Towson, and Linden, with similar clearance licenses to each of the theatres. The justification claimed by the plaintiff for this is that the Crest is not in competition with theatres in downtown Baltimore.

So much by way of a brief statement of the undisputed background and situation in the case, and then a statement of the claims made by the plaintiff.

Now, members of the jury, I instruct you that the Anti-Trust laws, under which this suit is brought, provide that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is illegal, and they authorize any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust laws to bring suit for three-fold damages. The corporations which are defendants in this case are persons within the meaning of these Acts of Congress. All three phases of the motion picture



business involved in this case, namely, first, production, second, distribution, and, third, exhibition, [1885] constitute a part of interstate commerce within the meaning of these Acts of Congress.

I further instruct you that, in spite of the broad language of the law as I have given it to you in brief form, these Anti-Trust laws, while forbidding monopolies in restraint of trade, have not been construed as forbidding every restraint of trade, but only those restraints that are unreasonable concerning all articles or commodities in interstate commerce.

We have now reached the point, therefore, when it is necessary to consider what is a conspiracy within the meaning of these Anti-Trust laws?

I instruct you that a conspiracy is an agreement, express or implied, between two or more persons to do an illegal act, or to do a legal act in an illegal manner. It is a combination by two or more persons to accomplish an unlawful purpose by joint or concerted action. An unlawful conspiracy may be, and often is, formed without simultaneous action or agreement on the part of the conspirators.

There are two kinds of evidence, therefore, that you have in cases of this kind and which you have in this case, namely, direct and circumstantial evidence. Direct evidence is evidence which if believed proves the existence of the fact in issue, without any inference or pre- [1886] sumption. Circumstantial evidence is evidence which, without going directly to prove the existence of the fact, gives rise to a logical inference that such fact does exist. Both kinds of evidence may be of equal probative value; and, in arriving at your verdict, you are to consider all of the evidence, both direct and circumstantial.

The mere fact that plaintiff has seen fit to join a number of parties as defendants, I instruct you, does not, of course, mean that all or any of them are liable to the plaintiff, unless their liability is proved according to the rules of law on the facts as I am now giving you those rules of law.

Plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged

on its own merits. This is especially true wherever the facts to sustain the nature of the charge made or offense asserted differ with regard to one defendant from those regarding all or some of the remaining defendants. You will recall from the testimony that that is the situation with respect to one or more of the defendants in the present case. I shall allude to that a little more specifically later on.

Each defendant, therefore, is entitled to individual consideration of the evidence, as applied to it, to determine whether that particular defendant participated [1667] in any combination or conspiracy. No defendant is to be prejudiced in your minds merely because it has been named by the plaintiff, along with others, as a defendant in this case.

I further instruct you that it follows from what has just been said that you may, on the evidence, find a verdict in favor of one or more defendants, even though you may also, on the evidence, find against one or more of the other defendants.

The plaintiff in this case, I instruct you, as in other civil cases of this kind, has the burden of proving the essential elements which entitled it to recover. And in this case the plaintiff, as to each of the alleged causes of action, has the burden of establishing that a conspiracy existed among these defendants, or some of them, to violate the Anti-Trust laws and so suppress independent competition, and, further, that the plaintiff was damaged by such a conspiracy. Those elements the plaintiff has the burden of establishing by a fair preponderance of what you may find to be the credible evidence. In other words, members of the jury, in this case, as in all ordinary suits between individuals or corporations, if A sues B, the law says that A must sustain the burden of proving what he claims; and that burden must be sustained to the jury's satisfaction by the weight of the credible evidence as the [1668] jury finds it.

Parenthetically, I might contrast the situations which you have learned from your experience in criminal trials. In criminal cases, the burden of proving the guilt of the accused rests upon the Government, and, in order to convict, that

burden must be sustained to the jury's satisfaction beyond a reasonable doubt. In civil suits of this kind the burden necessary to be sustained by the moving or claiming party is met if it is supported by what the jury finds to be the weight of the credible evidence.

I instruct you that plaintiff's first cause of action—I have explained already that there are two separate grounds for plaintiff's suit, called causes of action—relates to alleged loss of what we may abbreviate as first run business. Before plaintiff can recover on this first ground or cause of action, I instruct you that it must establish to your satisfaction, by the weight of the credible evidence, first, an agreement, combination, or conspiracy to unreasonably limit the licensing of first run pictures to certain exhibitors, to the exclusion of plaintiff and the Crest Theatre; second, that, as a direct and proximate result of so doing, the plaintiff has been injured in its business; and, third, that the damages to its business are capable of reasonable ascertainment from the evidence in the case, and are not merely [1000] speculative or conjectural damages. If the evidence fails to establish to your satisfaction any one of these elements, I instruct you that, then, your verdict must be for the defendants on this first ground or cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or the greater weight thereof lies, then I instruct you that your verdict must be for the defendants on this first cause of action.

Now, turning to the second cause of action, I instruct you that in order for plaintiff to recover on it, which relates to alleged loss of what we will abbreviate as the second run business, plaintiff must establish, first, an agreement, combination, or conspiracy on the part of the defendants to restrain trade in the licensing of pictures to the Crest Theatre by unreasonably discriminating against that theatre; (2) that, as a direct and proximate result of so doing, the plaintiff has been injured in the business of that theatre; and (3) that the damages to that business are capable of reasonable ascer-



tainment from the evidence in the case, and are not merely speculative or conjectural.

As you have heard from the testimony, plaintiff asserts that the Crest Theatre has been unreasonably discriminated against on three grounds, in connection with [1670] this second claim or cause of action: first, that on first neighborhood runs, Crest was charged more than other neighborhood theatres, that is, the license charges per picture have been higher. The defendants, as you have heard, deny that there was any such difference charged. Secondly, plaintiff asserts that at least one of the defendant companies discriminates against Crest by giving to Loew's own Parkway Theatre seven-day runs of its own pictures prior to letting the Crest show the pictures. Defendant Loew's admits this, but has introduced evidence to the effect that it treats all other neighborhood houses in exactly the same way that it treats Crest in this respect, and also relies upon the right,—which I instruct you is its legal right—to show its own pictures in its own theatres exclusively, as and when it sees fit. In other words, members of the jury, on this latter point, to clarify it, I instruct you that if a man has a theatre of his own and he has pictures of his own, he can show those as and when he feels like it, in his own theatre, just like if you have a grocery store, or any other kind of a store, and if you grow crops or raise anything, you can sell it in your own place. But if, in addition to doing that, you sell some of your products to others, then, of course, you begin to enter the field wherein it may give rise to charges of discrimination. The third assertion of plaintiff in connection with this [1671] second cause of action, based upon subsequent run business, is that Crest should be given clearance over other neighborhood houses. Defendants admit that all of the defendants do not give exactly the same clearance to Crest as to all other neighborhood houses; but defendants claim that such variations as they have testified to as being made, are reasonably justified and are not prejudicial to Crest, and that there is no conspiracy in any of this, as indicated, they claim, by lack of, rather than the existence of uniformity of action.

If the evidence fails to establish to your satisfaction, by the weight of the credible testimony, any one of these elements that I have just referred to, then your verdict must be for the defendants on this second cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or greater weight thereon lies, then, I instruct you,—just as in connection with the first cause of action—your verdict must be for the defendants on this second cause of action. And since, as the result of the explanation just given you, the plaintiff asserts these two separate causes of action, you must consider the evidence separately as to each and determine whether or not the plaintiff has sustained the burden of proof, as I have explained it to you, with respect to each [1672] cause of action.

If, from all the evidence, you believe that the defendants acted independently and without any illegal concerted action, then whatever harm may have been visited upon plaintiff is merely one of the hazards implicit in our competitive system, and your verdict must be for the defendants.

I further instruct you, members of the jury, that proof of conspiracy requires more than mere suspicion or conjecture. There must be direct proof of conspiracy, as I have defined it to you, or circumstantial evidence sufficiently strong as to give rise to an inference of conspiracy. The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants. It is not enough that there has been created in your minds some doubt or suspicion as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and base [1672] a judgment upon in the disposal of important matters.

The similarity of the business practices of certain of the defendants does not necessarily lead to the conclusion that they were in a conspiracy. If you find that such similarity results from nothing more than a common business solution of identical problems in a competitive industry, the similarity of conduct would not require the conclusion that a conspiracy actually existed. Each of the defendants has a right to license its pictures by licensing successive runs thereof and to grant reasonable clearance between each of the successive runs. Clearance is granted to protect the right of the licensee in the run granted; and a reasonable clearance is not a violation, I instruct you, of the Anti-Trust laws. It is only an unreasonable provision that is a violation. But where the clearance granted is unreasonable, in either time or extent, or where it is granted as a part of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes a violation of the Sherman Act, which is one of the Anti-Trust Acts on which, as I have explained, this case is based.

Without regard to the period of clearance, the licensing of pictures for exhibition on different successive days is considered by this industry, as you have heard [1874] testified here, essential in the distribution of motion pictures; and either a license for successive days or one providing for clearance permits the public to see the pictures in later exhibiting theatres at lower admission prices, so that each class of the public may have the opportunity of seeing motion pictures for progressively reduced admission prices.

I may refer at this point to what the testimony has disclosed in relation to some of the costs: that the cost of each black-and-white print of each motion picture varies from \$150 to \$300, depending upon the length of the picture, while the cost of the technicolor prints varies from \$600 to \$1,200, depending upon the length of the picture; that many of the bookings in the lower admission theatres are for less than the cost of the print. So, the exhibitions would be confined to the higher admission price theatres unless a



method of successive runs, with reasonable clearances for the protection of the earlier runs, be used in the industry.

I further instruct you that each distributor, acting individually, has the right to grant or withhold clearance as between theatres which are in substantial competition. Plaintiff asserts the Crest Theatre is not in competition at all with downtown Baltimore theatres. Defendant asserts, however, that these theatres are in [1875] very substantial competition with the Crest and other neighborhood theatres.

In considering whether the defendants acted independently in granting or withholding clearances in licensing pictures for exhibition at the Crest and in its competitive area, you are to consider the manner in which each company did the licensing. If you find from the evidence that there is no proof of any conspiracy, as I have defined it to you,—if you also find that the defendants did not license in the same manner,—you should find for the defendants.

No theatre, I instruct you, has the absolute right, as a matter of law, to demand from a motion picture producer or distributor the right to priority in runs. It is the right of each distributor, acting independently, to select its customers. Therefore, the plaintiff has no absolute right to demand exhibition rights for first run of any of the pictures of any of the defendants. So, plaintiff has no absolute right to obtain a license to exhibit any motion picture distributed by any defendant on first run in the City of Baltimore.

If you find from the evidence that each of the defendants, in licensing its pictures for first run exhibition in Baltimore, endeavored, entirely independently, to select that customer which would ultimately yield it [1876] the greatest revenue, having due regard to its past business relations with the customer, its skill and character of management, the size and character of its equipment, and the drawing power of the theatre, then you can find for the defendants on the first cause of action, that is, the one with respect to this claim of right to first run preference, or at least day and date with downtown.

I instruct you that the location of a motion picture

theatre is one of the important factors to be considered, along with many other factors, in determining its suitability for exhibiting pictures on a first or an early run, some of the other factors being the seating capacity, the admission prices charged the patrons, the facilities which it provides for the comfort and convenience of the patrons, and the size and character of the neighborhood from which the particular theatre draws the major portion of its patronage, or is likely to draw it.

As you have heard from the testimony, Loew's, one of the defendants, had a stock interest in a corporation operating the Century, the Valencia and the Parkway theatres. During all of the time here in controversy, Loew's had a right, as a distributor, to prefer its own theatres, as I have explained, as customers in licensing its own pictures. The fact that Loew's did license its pictures for first run exhibition in its own theatres, rather than for first run [1677] exhibition in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

You are further instructed that Loew's had the right to license its own pictures in its own Parkway Theatre fourteen days after first run downtown and ahead of other theatres, and its action in so doing was not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

Turning to Warner Bros., it is in the testimony that Warner Bros. Circuit Management Corporation, which is one of the companies that was dismissed from the case, owns and operates the Stanley Theatre. Warner Bros., and its affiliate, Warner Bros. Distributing Corporation, during all of the time in controversy here, had a right to prefer its own theatre as a customer in licensing its own pictures for exhibition in the Stanley. The fact that Warner Bros. did license its pictures for first run exhibition in its own Stanley Theatre, rather than for first run exhibition in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Warner.

The defendants Columbia and Universal are engaged in the business of producing and distributing motion pictures,

as you have heard from the testimony. These defendants do not engage in the business of exhibiting pictures.

[1678] Defendants Paramount and RKO are engaged in the business of producing and distributing motion pictures. Since about December, 1949, Paramount has not been engaged in the business of exhibiting motion pictures, and since about December, 1950, RKO has not been engaged in that business.

Defendant United Artists is engaged only in the business of distributing motion pictures produced by other parties. It does not engage in the business of exhibiting pictures.

The plaintiff urges, in support of the charge of conspiracy, that, as a result of concerted action, the defendants refused to sell the plaintiff first run pictures. If any defendant so refused, pursuant to its own business judgment, and if such defendant was acting independently and not in a combination or a conspiracy, such defendant was within its rights in so refusing. In other words, the preference of one exhibitor over another is not, in and of itself, a combination in unreasonable restraint of trade. It is natural for a distributor not to be prone to substitute unknown customers for proven ones.

As I have instructed you, members of the jury, in order to establish a right to recover, plaintiff in the present case must show, (1) a conspiracy in restraint of trade that is unreasonable, as I have defined it to you, [1679] in relation to the motion picture business; (2) injury directly caused to its business by such unreasonable restraint.

The law further provides, I instruct you, that if any of the acts prohibited by the Anti-Trust laws which are alleged to have damaged the plaintiff have previously been established against the same defendants by a decree obtained by the United States Government, in either a criminal or a civil, that is, an equity proceeding, under these Anti-Trust laws, then the plaintiff may, in aid of its present case, rely upon such judgment or decree previously obtained by the Government, in proving the existence of the prohibited acts to the extent that the law provides that such previously obtained judgment or decree is *prima facie* evidence against



the defendants in a suit of the present nature brought by the plaintiff against them,—that is *prima facie* evidence, not conclusive evidence, as to all matters involved in the present case that were decided by the previous decrees.

I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government [1680] and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees [1681] in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give

it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants.

I will just summarize that again. I told you earlier that the burden of proof in this case, just like in all civil suits, generally speaking, rests upon the moving party; and if A sues B, the law says that A must prove his claim in order to recover. That is true in this case, as I have explained. But, by reason of the fact that what we may call the broad issues involved in this case were involved in the Paramount case, there is a statutory provision which allows those issues, insofar as they may have a bearing upon the issues in a particular case like this, to become *prima facie* evidence; and, if you find, as a result of your examination of those decrees, that, as respects clearances, these defendants, or any of them, have given unreasonable clearances, it is not necessary for you to find that the plaintiff has proved that, but the burden of showing that they are not unreasonable shifts over to the defendants.

I might explain that a little more in A-B-C [1682] language in this way: a court order, which is called a decree for the purposes of this kind of a case, is obtained against certain parties,—let us say in a trademark case—that they can only use a certain label or words in a certain way, and the party that was originally aggrieved thinks that label has not been followed out; but that a label in violation of the court's order has been used; so the parties can be brought into court; and then the burden is on that party who has used the new label to show that he is within the order of the court and is not in contempt of it. That, I think, explains somewhat the only really technical point of law that exists in this case.

I instruct you, members of the jury, that if you find from the evidence that the plaintiff was not acting in good faith in submitting offers for the right to exhibit pictures on first run in the Crest Theatre, then the rejection of such offers is no evidence of unlawful conduct on defendant's part. If the plaintiff was acting in good faith in submitting these offers, you should consider the financial condition of the

plaintiff, the gross receipts of the Crest, and the ability of the plaintiff to pay the film rental offered.

Even if you should find from the evidence that the defendants combined and conspired in unreasonable restraint of the plaintiff, as I have defined combination [1683] or conspiracy and unreasonable restraint, if you also find that the plaintiff was injured in its Crest Theatre business as a direct and proximate result of such illegal act, nevertheless, the plaintiff's right to recover must be limited to actual damages, that is, damages that you find have been sustained in the period alleged by the plaintiff, namely, from February, 1949, to March, 1950, in an amount which can be determined with reasonable certainty from the evidence, and only from the evidence. The plaintiff is not entitled to damages which are merely speculative, remote or uncertain.

If, after applying these rules which I have given you to the weight of the credible evidences as you may find it, you should find that the plaintiff has been damaged actually, then the rule you must apply in measuring such damages is the amount of additional gross income which you find plaintiff would have realized from the operation of the Crest Theatre during the period here in question, had the defendants not combined or conspired unreasonably to restrict plaintiff in obtaining defendants' pictures, less such additional reasonable operating costs that you may find plaintiff would have incurred in showing the additional or different runs of pictures.

Lastly, I instruct you that the amount of your verdict, if you should find a verdict for the plaintiff, [1684] should be limited to plaintiff's actual damage, in the sense that it should be based, and must be based, upon the extent to which plaintiff's business has been damaged, as above explained. You do not first find the amount of actual damage and then treble it, and then report the trebled amount as your verdict. That would be wrong, because, as a matter of law, under the statute, your verdict in a suit of this kind, if there is a verdict for the plaintiff, is trebled not by the jury but by the Court. I refer to that treble feature in closing lest you may



not heretofore have fully understood its application to this case. It is a matter for the Court to apply, and not the jury.

Now, members of the jury, in closing, you may refresh your recollection from the figures, as well as from all other physical exhibits that have been introduced in this case relative to the alleged losses by the plaintiff, and the testimony which has been introduced by the defendants, on the other hand, purporting to indicate that there has not been any such loss.

Just as I have refrained from going into any of the real details of the testimony with respect to conspiracy and other features of the case, I shall not detain you by attempting to analyze these schedules of alleged losses.

I think I have covered all of the essential principles of law that are involved in the case, and I trust [1685] I have made sufficient allusion to some of the facts in order to illustrate the application of those principles of law to the facts as you may find them. Therefore, I will not go into them any further.

You will have access in your jury room, as has been explained, to all of the exhibits, also the transcript, the official writing-up of every word of the testimony, which is indexed, if you care to examine it.

The Baliff will now be sworn, unless counsel want to make any statements with respect to any exceptions to the charge.

MR. ROME:—We would like to, Your Honor.

THE COURT:—Are they lengthy?

MR. ROME:—To some extent, yes, sir.

THE COURT:—Have you any to make, Mr. Watkins?

MR. WATKINS:—Yes, Your Honor. There is one on which I think we will all agree; but the other one I think should be made out of the presence of the jury.

You referred to the claim for damages in the first cause of action as \$250,000. The figures were transposed. The claim is \$205,000.

—THE COURT:—You are correct about that. It is \$205,000.

If you have some exceptions to make, I will hear you out of the presence of the jury.

[1686] Meanwhile, members of the jury, you may retire to the jury room. If there be any additions or corrections to be made, you will be asked to come back.

(The Jury then retired to consider its verdict.)

[1687] THE COURT:—Mr. Rome, you might give me, just in outline, if you can, what you object to; and I will rule on it. Then, if you want to elaborate on it, if I do not grant the exception, you may do so by dictating it more at your leisure to the Court Reporter.

MR. ROME:—The first thing, sir, is with regard to your statement concerning the fact that the suit was originally brought in Philadelphia, and your statement to the Jury that it might originally have been brought in this Court.

THE COURT:—I understand so. That is what I understand is the basis of the Court's opinion. That has nothing to do with the merits of the case, anyway.

MR. ROME:—We think it might be prejudicial to the plaintiff.

THE COURT:—I do not see how it is possible. Let me have the opinion, Mr. Clerk.

I will say this to all counsel, that I am not disposed to spend another afternoon going over a lot of little things which you would like to have in the charge. I will announce now that I am not disposed to put anything more into the charge, unless I can be convinced beyond a reasonable doubt that I have made an error. If I have omitted something that I did not think was necessary, I shall not put it in.

[1688] MR. ROME:—In that opinion, sir, it is stated there is grave doubt whether the suit could have been originally brought here.

THE COURT:—I am prepared to stand on the statement that, apparently, it could have been brought. It seems to me to have fitted in within the statute which is quoted by Judge Grim that, "for the convenience of the parties, and in the interest of justice, the District Court may transfer any civil action to any other District or Division where it

might have been brought." And he allowed it to be so transferred, presumably for the reasons that are in the statute.

I think it comes with ill grace for you to make any point of that now. You did not stress that. You stated in your argument, I think, that you did not make any point of that.

We will not spend any more time on that.

MR. ROME:—May I say just one word about that, sir? I do not want Your Honor to think that I do something in ill grace. The fact that Judge Grim points out there—

THE COURT:—What has that to do with the case? I might properly not say anything about it. But you mentioned it, and I did not want to leave the Jury up in the air about the Philadelphia case.

[1689] MR. ROME:—I mentioned it only because Mr. Boyd brought it up at the tail-end of the case; and I think it prejudices the plaintiff.

THE COURT:—I can't, for the life of me, see how it can be prejudicial to anyone. The jury does not have anything to do with the jurisdiction. They sit on the case as it comes to them. That is the law.

MR. ROME:—May I have an exception?

THE COURT:—Oh, yes. You may have exceptions to all of them.

MR. ROME:—You made reference to the fact that seven of the defendants so distribute. Actually, there are eight distributing companies. Warner Bros. Pictures Distributing Corporation is a defendant, and is one of the companies.

THE COURT:—I don't think that makes any difference, if I made that slight error. I brought them all in under the same general ground of conspiracy, whether they are producers, exhibitors, or distributors. One of them is segregated. That is what I tried to point out. If I have not quite correctly interpreted the facts, that is not binding upon the defendants, anyway.

Motion overruled.

MR. ROME:—May I have an exception?

THE COURT:—Yes.



[1690] MR. ROME:—You said Warner Bros. Circuit Management Corporation is no longer in the case.

THE COURT:—That is what I was told. I have it here that Warner Bros. Circuit Management Corporation is out of the case.

MR. ROME:—Excuse me, sir; but I believe there is an error with regard to that. It was Warner Bros. Pictures, Inc., which was not served, and is out of the case. Warner Bros. Circuit Management Corporation is very much in the case.

THE COURT:—Do you admit that I made a mistake in the name?

MR. WATKINS:—Yes, Your Honor.

MR. RAFTERY:—The only thing is that we want to be sure that, if we admit, as we have to do, your instructions as to Warner's right to license its own theatres has the same bearing and effect.

THE COURT:—No; I will not add a thing to what I have said, except, if I have made a mistake. And I thought I was very careful, when the parties gave the name, to mark out the right ones. If I marked out the wrong ones, I shall tell the Jury that I used the words "Warner Bros. Circuit Management" as being out of the case, but it ought to be "Warner Bros. Pictures, Inc."

MR. ROME:—Yes, Your Honor.

[1691] MR. RAFTERY:—It is not on the Reporter's copy. It is on the record, I believe, as "Warner Bros."

THE COURT:—They were never served; that is, Warner Bros. Pictures was never served?

MR. RAFTERY:—That is right.

THE COURT:—Then, the statement was made that another Warner Bros. was out of the case. I know somebody made the statement.

MR. RAFTERY:—I think Mr. Watkins, in his argument, made at the close of the plaintiff's case, said, in effect, that Warner Bros. Circuit Management Corporation, so far as the evidence is concerned, is out of the case. There has been no proof, because they do not distribute any pictures.

THE COURT:—Are you agreed, that is, are both sides agreed that where I said there were eight in the case, I should have said there are nine?

MR. RAFTERY:—That is right, Your Honor. Your Honor stated, in ruling on the instructions—

THE COURT:—Well, wait until I finish with Mr. Rome.

MR. ROME:—I would like to except to those portions of your remarks to the Jury which had to do with the legal right of Loew's Incorporated and Warner Bros. Distributing Corporation to put their own pictures in their own theatres.

THE COURT:—Motion overruled.

[1692] MR. ROME:—May I have an exception, if Your Honor please?

Your Honor also said the Crest had sought clearances over other neighborhood houses. Actually, sir, that situation came up only with regard to not having to play day and date—

THE COURT:—That is a factual question. If I misinterpreted the evidence, I will not change that.

Motion overruled.

MR. ROME:—And Your Honor will allow me an exception?

Your Honor also said that similarity of action does not necessarily lead to the conclusion of conspiracy; and you said, also, that if there was a common solution to common problems on the part of these distributors, there would be no conspiracy.

THE COURT:—That is what I understand to be the law; and I so instructed the Jury.

MR. ROME:—I would like an exception to that, if Your Honor please.

THE COURT:—Very well.

MR. ROME:—Would Your Honor be kind enough to hear me for just a moment?

THE COURT:—No. We have been all over this. Everything in the charge was discussed almost into the [1692-A] night, *ad nauseam*, almost I think you might say.

MR. ROME:—Your Honor, without attempting to burden

you further with remarks, I would like to except to that portion of the charge in which you made the statement to the Jury that the Crest claimed that it was not in competition at all with the downtown theatres. That has never been the contention made by the plaintiff, sir.

THE COURT:—Well, not in substantial competition?

MR. ROME:—That is correct, sir.

THE COURT:—You want me to say “not in substantial competition”?

MR. ROME:—That is correct, sir.

THE COURT:—Very well, I will do that.

MR. ROME:—Your Honor also said, with regard to the distributors having the right to disprove the charge of past relationships existing between themselves and some other exhibitors, that they had been found in the past to have used the satisfactory customer method—\*.

THE COURT:—Motion overruled. Every one of these points, like the last one, was thoroughly argued, and I told you what I was going to do in the charge.

MR. ROME:—And may I have an exception?

THE COURT:—Yes.

MR. ROME:—Your Honor also said that, with regard to the right of Warner and Loew's putting their own [1693] pictures in their own theatres, that that is not, in and of itself, proof of conspiracy. But I would request to charge Your Honor that it may be proof of conspiracy, along with the other facts.

THE COURT:—I did not say it might not be. That is why I put in “in and of itself”.

MR. ROME:—May I have an exception?

I would also like to except to that portion of the charge with regard to Warner and Loew's, since, in no event, did Your Honor make any reference whatever to the fact that

Plaintiff contends this is an erroneous report of counsel's statement. It should read:

“Your Honor also said the distributors have the right to regard the past relationship existing between themselves and some other exhibitors, but they have been found in the past to have used the ‘satisfactory customer’ method \* \* \*



even though these distributors might have some right to put their own pictures into their own theatres, there would be the element of day and date and the prohibition in the Paramount decrees, on the part of these distributors in granting clearances to theatres not in substantial competition.

THE COURT:—Motion overruled.

MR. ROME:—And Your Honor will grant me an exception?

We also request, with regard to your statement to the Jury, concerning the fact that the factual situation in Baltimore was not raised in the Paramount case, that the Jury be advised that there was no necessity on the part of the Government to prove the factual details with regard to that situation but that, on the contrary, the Government [1694] need not do that, and the Jury might still conclude that the evidence in the Paramount case is to be *prima facie* evidence.\*

THE COURT:—Motion overruled.

MR. ROME:—An exception, if Your Honor please.

Your Honor also spoke with regard to the fact that the Jury should consider the impact of the Paramount case solely on the basis of the decrees that had been offered and received in evidence.

THE COURT:—The decrees, as I explained it to them. That is all they had before them.

MR. ROME:—That leads to certain other exceptions that I would ask for with regard to specific requests for instructions contained in our requests submitted to you, which we believed should be given to the Jury with respect to specific aspects of the Paramount case.

THE COURT:—Motion overruled.

MR. ROME:—An exception, if Your Honor please.

We request an instruction to the Jury with regard to the fact that they can reach their own measure of damages, regardless of what the plaintiff may have introduced by way

\* Plaintiff contends that this is an erroneous report of counsel's statement. It should read:

" \* \* \* and the jury should still consider that the evidence in the Paramount case is to be *prima facie* evidence."

of damage formulae, so long as it is a reasonable approximation of the loss suffered by the plaintiff.

**THE COURT:**—I did not say they could reach their own if they did not hew to the testimony. They do not [1605] have to adopt the figures given by the plaintiff, or by the defendant, or by anybody; but they can't pull it out of the air.

Motion overruled.

**MR. ROME:**—That is my point, sir, that they need not adopt the plaintiff's figures.

**THE COURT:**—I think I made it amply clear.

Motion overruled.

**MR. ROME:**—An exception, if Your Honor please.

I would also request a further instruction to the Jury with regard to the fact that there need not be any mathematical exactness with regard to the measure of damages, so long as there is a reasonable basis of approximation.

**THE COURT:**—I think I said practically that.

Motion overruled.

**MR. ROME:**—An exception, if Your Honor please.

I would also request an instruction to the Jury regarding the adverse inference to be taken from the fact that the defendants might not have called responsible executives of the various companies whose testimony was available on the subject

**THE COURT:**—Motion overruled.

**MR. ROME:**—An exception, if Your Honor please.

With regard to the rest, sir, they have to do [1606] with our specific written requests; and, since I understand Your Honor is intending to overrule our requests for them, may I at least repeat them or give copies of them to the Reporter so that they may appear in the record?

**THE COURT:**—Very well.

**MR. ROME:**—And Your Honor will grant me an exception?

**THE COURT:**—Oh, yes. Bring it up later on.

**MR. ROME:**—These are the exceptions that I refer to.

The Plaintiff excepts to that portion of the charge in

which the Court told the Jury that plaintiff's claim had to be judged separately against each Defendant, and that each defendant was entitled to individual consideration since the Court has ruled in the Paramount case that these defendants were to be treated collectively.

Plaintiff excepts to that portion of the charge of the Court which stated that the distributors have a right to license their pictures for successive runs as that permits a system of progressively reduced admission prices, thus enabling the public to have access to the pictures at the reduced admission prices. The grounds of exception is that this statement, standing alone and without relating it to the claim of the plaintiff, namely, that if they were accorded access to first run films it [1697] would not in any way eliminate the system of successive runs and progressively reduced admission prices to the public, is not a fair and accurate statement of the issue. Furthermore, this right on the part of the distributors must be stated in relation to their legal obligations with respect to the plaintiff and any others similarly situated.

The Plaintiff excepts to the charge of the Court dealing with the subject of locations of theatres being one of the important factors in considering whether or not it is entitled to have access to pictures on first run, and that other factors are to be considered such as seating, age, admission prices, comfort, convenience of patrons, size and character of neighborhood of patronage from which it is expected to draw. The reason for this exception is that these factors are important primarily in respect to a demand for a first run exclusive in the City and are not the determining factors with respect to a demand or request for first run day and date with a theatre or theatres located in the downtown area.

The Plaintiff excepts to the charge of the Court in which it attempts to state what the plaintiff's claim was, where the Court said substantially the following: "That the plaintiff could have played pictures in its Crest Theatre on first run with clearance in favor of all the theatres in this immediate area, and the same thing [1698] could be done in a number of other areas. Plaintiff says that other theatres in its im-



mediate area would also be entitled to the same right." This does not correctly state the plaintiff's position because it stated that it wants the opportunity for first run in its area, recognizing at the same time, however, that other theatres in its immediate area which are adequate and suitable for first run would have a like opportunity, and that the distributors could either institute competitive bidding or competitive negotiations, and whichever theatre in its area was the winner, that theatre, whether it be the Crest or some other theatre, would then be entitled to clearance against all of the other theatres in its immediate area and with which it is in substantial competition.

Plaintiff excepts to that portion of the Court's charge to the Jury in which he likened the distribution of motion pictures to the operation of a grocery store or any other commercial enterprise, the reason being that the defendants in the present case produce and distribute by far the greatest number of desirable feature motion pictures, without which it is impossible for an exhibitor to operate a first run theatre successfully.

The Plaintiff excepts to that portion of the Court's charge on which it was stated that if the defendants simply reached a common solution for common problems that [1699] there would then be no conspiracy, since even a common solution to common problems if extended so as to result in a nationwide policy may, in itself, be violative of the antitrust laws.

The plaintiff excepts to that portion of the Court's charge to the Jury in which it spoke of possible bad faith on the part of the plaintiff in submitting offers for pictures and spoke further concerning certain criteria which the defendants may apply in considering those offers, the reason being that there is no legally sufficient evidence in the record from which the Jury could find or infer bad faith on the part of the plaintiff.

The Plaintiff excepts to the refusal of the Court to charge the Jury in accordance with plaintiff's requested instructions numbered 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 30, 31, 33, 38, 39, 42, 44, 47, 48, 49, 52, 54, 55, 60, 61, 63, 64,

65, 66, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95.

Plaintiff excepts to the charge of the Court on the grounds that it selected various contentions of the defendants for discussion almost exclusively, without giving the correlated contentions of the plaintiff in respect to the individual detailed subject matters discussed by the Court, thereby laying undue emphasis on the defendants' [1700] contentions.

The Plaintiff excepts to the Court's charge to the Jury because it did not fairly state the issues in the case nor did it direct the Jury's attention to the real issues in the case in a fair and impartial manner.

THE COURT:—Do you want to say something, Mr. Watkins?

MR. WATKINS:—I want to except to Your Honor's failure to grant the request for an instructed verdict.

THE COURT:—You did that at the close of the plaintiff's case, and at the close.

MR. WATKINS:—The others consist of a series of objections in connection with the Paramount case. I will just dictate that to the Reporter afterwards, if Your Honor thinks that would be better.

THE COURT. —What, in outline, are they? Just give me a general summary.

MR. WATKINS:—The general summary is that Your Honor indicated to the Jury that they might find that the Paramount decree is *prima facie* evidence with respect to all matters involved in the present case, recited in the previous decision. It is my contention that the matters before the Jury in this case were not decided in the previous case. You left to the Jury to decide what matters were. My objection is to the failure of Your Honor to specify to them [1701] exactly what matters were involved in the Paramount case.

THE COURT:—I couldn't tell them, and I don't think I am required to tell them. I don't think anybody knows, unless they read the testimony, everything that was decided. I said that in the Paramount case it was found, previous to the opening of the Crest Theatre, that these defendants had

conspired together in unreasonable restraining of trade in violation of the antitrust laws,—these same laws involved here,—in restricting to themselves first runs and in establishing certain clearances in numerous places throughout the United States.

I think that is just about as specific as a trial court, in a case of this kind, could possibly go. I couldn't take the Jury all over the United States. The decrees are all that are required to be put in or all that may be put in, plus a reasonable explanation of what the decrees were intended to cover.

Now, this is about the third time that I have been over this, I guess, or really the fifth. When I went over this very statement that I have read, and read in my instructions, this morning, as I recall it, nobody made any objection to this on this ground. You had ample opportunity to do it. Nobody made any objection on this ground. Of course, I know you were objecting all along to letting those decrees in at all; but this is the first [1702] time I have heard coming from the defendants the thought that if the decrees were going in, this was not a sufficient outline of the decrees and the effect to be given to them.

Objection overruled.

MR. WATKINS:—I except to that portion of the charge in which Your Honor instructed the Jury that the decrees were *prima facie* evidence in the present case of what the defendants had done in Baltimore, the ground being this, that the decrees themselves do not disclose that the defendants, in Baltimore, had done anything.

THE COURT:—I did not say that they disclose what they had done in Baltimore.

MR. WATKINS:—Then, my note is in error.

THE COURT:—Here, I think, is almost the exact language that I gave. I will begin again and go over the part I just gave.

"I instruct you that in the previous equity suits between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defend-



ants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States."

[1703] Now, I am quite sure the following was given practically verbatim: Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case,—the proof of facts which I have just stated. But I had not said a word about Baltimore. —"which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence" in support of that claim.

MR. WATKINS:—I seem to have it reversed.

I except to that portion of the charge Your Honor just read, on the ground that what the defendants may have done in Baltimore was not comprised within the Paramount case.

I except to the portion of your charge in which you instructed the Jury that if they found violations with respect to clearance, then the burden of proof of reasonableness of clearances rests upon the defendants. I am simply preserving my exception.

Of Course Your Honor understood, I am sure, that those exceptions were taken on behalf of all defendants.

THE COURT:—Oh, yes. Of course, there is bound to be some confusion. You had originally, as I understood [1704] it, three Warner Bros. Companies. Is that right?

MR. WATKINS:—Yes.

THE COURT:—Only one of them has gone out? Is that right?

MR. WATKINS:—Yes, Your Honor; that is correct.

THE COURT:—Warner Bros. Pictures, because never served?

MR. WATKINS:—That is correct.

THE COURT:—Therefore, when I said that two had gone out, it ought to be only one had gone out?

MR. WATKINS:—Yes, Your Honor.

THE COURT:—And the other thing which I will tell the Jury, raised by Mr. Rome—I suppose the Jury knows it, anyway; but I will tell them that the claim of the plaintiff is not that the Crest is in no competition with the downtown theatres, but that it is not in substantial competition.

Ask the Jury to come back.

[1705] (Further instructions to the Jury.)

(After the return of the Jury to the courtroom, at the direction of the Court, the following occurred:)

THE COURT:—Members of the Jury, counsel have called my attention to the fact that I made two erroneous statements as to facts. I am not sure that they would in any sense mislead you, but, lest they might, I will now correct them.

I think I stated that two of the defendants had been omitted from the suit, or the trial here. That was in error. There has been only one; and that is Warner Bros. Pictures. It is a little confusing, because there are three sets of Warner Bros., or three Warner Bros Companies. The only company that has been omitted from this list of ten defendants is Warner Bros. Pictures, and it was omitted because service was never had upon them. So, where I said eight defendants, it ought to have been nine.

Then, members of the Jury, my attention has been called to the fact that I was not accurate in saying that the plaintiff company claims it is in no competition with the downtown theatres. What I understand plaintiff really says, or the claim it makes, is that the Crest is not in any substantial competition with downtown theatres.

You may now retire to your deliberations.

[1706] (After the Jury had returned to the courtroom for the purpose of rendering its verdict, the following occurred:)

THE CLERK:—Members of the Jury, have you agreed on your verdict?

THE JURORS:—We have.

THE CLERK:—Who shall say for you?

THE JURORS:—Our Foreman.

THE CLERK:—For whom do you find upon the issues joined, the Plaintiff or the Defendants?

THE FOREMAN:—We reach a verdict in favor of the defendants, as to all of the defendants.

THE CLERK:—As to all of the defendants?

THE FOREMAN:—Yes, sir.

THE CLERK:—Members of the Jury, harken to your verdict as the Court has recorded it. Your Foreman saith that you find for all defendants upon the issues joined. And so say you all?

THE JURORS:—We do.

THE CLERK:—Verdict recorded.

\* \* \* \* \*

### PLAINTIFF'S REQUESTS.

9. Uniform participation by competitors in a particular system of doing business, where each is aware of the others activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the antitrust laws.

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d 738, 746 (C. A. 3, 1945);

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 583, 584, (C. A. 3, 1951) cert. denied April 21, 1952).

10. The defendants in this case have the burden of attempting to explain away the inferences of conspiracy which the law says that you may infer from their uniform course of conduct.

*Goldman Theatres v. Loew's, Inc., et al.*, 150 F. 2d 738 (C. A. 3, 1945);

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 584 (1951) cert. denied April 21, 1952.

11. The uniformity of policy on the part of defendants in this case of first unanimously denying the plaintiff access to first-run motion pictures, even though plaintiff offered to pay high guaranteed film rental, and then



unanimously granting plaintiff subsequent run pictures, is evidence which supports strongly the inference of concert of action and conspiracy on the part of the defendants.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 583  
(C. A. 3, 1951) cert. denied April 21, 1952.

12. The past proclivity of these defendants to unlawful conduct violating the anti-trust laws, as found by the Supreme Court of the United States in an action brought by the government, may be considered by you in reaching your decision in the present case since the conspiracy charged by the plaintiff here is identical in scope and nature to one of the conspiracies, the existence of which was condemned by the Supreme Court—concerted action to fix a uniform system of runs and clearances.

*Milgram v. Loew's Inc., et al.*, 192 F. 2d 579, 584  
(C. A. 3, 1951) cert. denied April 21, 1952.

. . . . .

14. In arriving at your verdict it is immaterial that the motion picture business in Baltimore, Maryland, may be a very small part of the industry as a whole. In principle, and within the intendment of the Sherman Act, the public interest is as much concerned with the improper control of the interstate market for the single city of Baltimore as for the country as a whole.

*White Bear Theatre Corp. v. State Theatre Corp.*,  
129 F. 2d 600, 605 (C. A. 8, 1942);

*United States v. Socony-Vacuum Oil Co., Inc.*, 310  
U. S. 150, 225 n. 59 (1940);

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d 738, 744 (C. A. 3, 1945);

*DeLuxe Theatre Corp. v. Balaban & Katz Corp.*,  
95 F. Supp. 983, 986 (N. D. Ill., E. D., 1951);

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 586  
(C. A. 3, 1951) cert. denied April 21, 1952.

15. The fact that the distributor defendants may or do own the pictures that they distribute does not relieve them from the obligation of licensing or rent their pictures in such manner as will not result in a violation of the provisions of the Sherman Anti Trust Act.

*Interstate Circuit, Inc. et al. v. United States*, 306 U. S. 208, 227 (1939).

16. The defendants in this case produce and distribute by far the greater number of the better or most sought after motion pictures distributed in the United States.

*Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 36 (1930);

*Interstate Circuit, Inc. et al. v. United States*, 306 U. S. 208, 214 (1939);

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 180 (1944);

*White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600, 603 (C. A. 8, 1942);

*William Goldman Theatres, Inc. v. Loew's et al.*, 150 F. 2d 728, 741 (C. A. 3, 1945);

*Gittone v. Warner Bros. Pictures, Inc.*, 30 F. Supp. 823 (E. D. Pa. 1939) reversed on other grounds 110 F. 2d 292;

*United States v. Paramount Pictures, et al.*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946) affirmed in 334 U. S. 131 (1948).

17. All operators of first-run motion picture theatres in the United States are dependent upon the defendants in this case for the supply of pictures necessary to keep their theatres in operation. No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants.

*White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600, 603 (C. A. 8, 1942);

*William Goldman Theatres, Inc. v. Loew's, et al.*,  
150 F. 2d 738, 741 (C. A. 3, 1945);

*Gittone v. Warner Bros. Pictures, Inc.*, 30 F. Supp.  
823 (E. D. Pa., 1939) reversed on other grounds  
110 F. 2d 292;

*United States v. Paramount Pictures, et al.*, 66 F.  
Supp. 323, 334 (S. D. N. Y. 1946) affirmed in  
334 U. S. 131 (1948).

18. Under all the evidence in this case you may conclude that the plaintiff's Crest Theatre has all of the necessary qualifications including size, equipment, appointments, management, location and access to potential patronage for successful use as a first-run feature motion picture theatre in the City of Baltimore.

. . . . .

21. In arriving at your verdict it is proper for you to consider, among all the other aspects of the case, the fact that five of the defendants own a large number of theatres located in various parts of the United States, and that all five of these defendants supply each other with a substantial number of feature pictures for use in the theatres owned or operated by each of these five defendants.

22. It would also be proper for you to consider whether or not the fact of this theatre ownership would be likely to influence the non-theatre owning defendants, in the distribution of their pictures, to unlawfully favor the theatre-owning defendants in a situation such as Baltimore where an independent seeks to enter the exhibition business.

23. In arriving at your verdict in this case it is proper for you to take into consideration the fact that the defendant Warner Bros. Circuit Management Corp.



and the defendant Loew's, Incorporated both operate first-run theatres in the so-called downtown area of the City of Baltimore in which they exhibit on first-run not only their own pictures but also pictures produced and distributed by other defendants. It is the plaintiff's claim that one of the real reasons for the refusal of the defendants to license their first-run pictures to the Crest Theatre was the mutual desire on the part of all defendants to benefit Warner and Loew's in their first-run exhibition activities in the City of Baltimore in return for similar favored treatment for themselves in other parts of the country.

24. In this case one of the questions with which you are concerned is the question whether or not the defendants, or any of them, entered into an unlawful combination with respect to the motion picture distribution and exhibition business in the City of Baltimore or acquiesced in such practice knowing that each of the other defendants would likewise do so, but in arriving at your verdict it is proper for you to consider the facts in evidence pertaining to the business relations of the defendants in other parts of the country, and to give effect to those facts insofar as you may believe that they tend to show that the defendants, or any of them, have between themselves an understanding, express or implied, to give to Warner Bros. Circuit Management Corp. and Loew's Inc. in Baltimore a substantially better opportunity to obtain product than the opportunity afforded the plaintiff.

*Holmes v. Goldsmith*, 147 U. S. 150, 164 (1893);

*Williamson v. United States*, 207 U. S. 425, 450 (1908);

*Morris v. United States*, 112 F. 2d 522, 527, 528 (C. A. 5, 1940) cert. denied 311 U. S. 653;

*United States v. Vehicular Parking Ltd., et al.*, 52 F. Supp. 751, 754 (D. Del. 1943).

25. A union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first run may constitute a violation of the antitrust laws.

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 183 (1944);

*William Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. 2d 738, 743, 744 (C. A. 3, 1945);

*Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F. 2d 594 (C. A. 2, 1949).

• • • • •

30. The decision of the defendants in this case to deny the Crest Theatre first-run pictures was effectuated through the device of clearance whereby the Crest Theatre was required to wait a period of 21 days or longer after the first-run exhibition of the defendants' pictures had terminated before being itself able to license such pictures. The system of clearance thus imposed upon the plaintiff's Crest Theatre was uniformly adopted by all of the defendants.

31. The Supreme Court of the United States has unqualifiedly condemned as violative of the antitrust laws any system of clearances which has acquired a fixed and uniform character and which is made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.

*United States v. Paramount Pictures*, 334 U. S. 131, 146 (1948).

( • • • • • )

33. The mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres in the City of Baltimore has no bearing upon the real issue in this case which is whether a general

system of clearance, uniform in that if carried out it would deny first-run pictures to every theatre located outside of the downtown area of a city with the object of eliminating first-run competition by such type of theatre, is a lawful restraint upon commerce.

*Milgram v. Loew's Inc., et al.*, 94 F. Supp. 416, 422 (1950).

40. Under all the evidence in this case you must return a verdict for the plaintiff in such amount as you estimate the plaintiff's loss to have been.

42. The purpose of the antitrust laws of the United States is to secure equality of opportunity for all persons within our economy. That purpose is thwarted if group power is used to eliminate or discriminate against a competitor who is equipped to compete.

*William Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. 2d 733, 743 (C. A. 3, 1945).

44. If you believe in this case that the plaintiff's Crest Theatre was fairly entitled under our system to access to first run pictures, either on an exclusive or a day and date basis, then, since it is undisputed that it was denied access to first run pictures, you must return a verdict for the plaintiff against some or all of the defendants if you find that such denial was due to concerted action, joint acquiescence or conscious parallel action.

48. As respects statements made by some witnesses for the various defendants that they did not join a conspiracy or combination to restrain competition, I charge you that you may completely disregard such testimony if you find that a necessary and direct consequence of the



acts of these defendants in denying first-run pictures to the Crest Theatre resulted in a restraint of competition in the exhibition of first-run pictures in the City of Baltimore. You may disregard such testimony because persons must be held to have intended the necessary and direct consequence of their acts and cannot be heard to say the contrary.

*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 248 (1899);

*United States v. Ready Co.*, 226 U. S. 324, 370 (1911);

*United States v. Patten*, 226 U. S. 525, 543 (1913);

*United States v. Masonite Corp.*, 316 U. S. 265, 275 (1942).

49. In deciding whether or not to believe the testimony of the witnesses called by the defendants to explain their reasons for denying first-run pictures to the Crest Theatre, you should give consideration to the fact that the defendants made important policy decisions, concerning the right of a theatre located outside of the so-called downtown area to exhibit first-run pictures, without having made any serious attempt to test the validity of those decisions. You may conclude, therefore, that the opinions of the defendants with regard to these matters were purely conjectural.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

52. I charge you that the fact that the defendants have advanced substantially the same reasons for identical, equivocal actions is of itself sufficient evidence from which you may infer guilt on their part.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

54. An act harmless when done by one alone may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed, and while defendants in the instant case, acting alone and in the absence of conspiracy, might refuse to license the showing of motion pictures first run in the Crest Theatre for the reasons defendants have assigned here, they cannot, when acting together in a conspiracy or by conscious parallel action to dominate the first-run exhibition of motion pictures, explain away that conspiracy by testimony of normal processes of competition or by comparison of their theatres with that of plaintiff.

*Milwaukee Towne Corp. v. Loew's Inc.*, 190 F. 2d 561 (C. A. 7, 1951) cert. denied 96 L. E. 298.

55. The mere size of the business of these defendants is in itself an earmark of monopoly power, since size carries with it an opportunity for abuse. The fact that the power created by the size of these defendants has been utilized in the past to crush or prevent competition is potent evidence that an illegal purpose or intent attends the monopoly power as held by these defendants.

*United States v. Swift & Co.*, 286 U. S. 106, 116;  
*United States v. Aluminum Company of America*,  
 148 F. 2d, 416, 430;

*United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 174 (1948).

60. The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not pre-

vent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act.

*Charge of Court in Applebaum v. Paramount (D. C. W. D. S. Div. Miss. 1951).*

61. The system of preferring old customers has been used by these defendants in the past as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful.

*United States v. Paramount Pictures, 85 F. Supp. 881, 898 (1949).*

63. A motion picture distributor is not justified in preferring a customer with whom it has done business in the past to a new customer, where the new customer offers an equal or better opportunity for the exhibition of the motion picture distributor's films in the community, and is willing to offer equal or better terms to the distributor for the exhibition of its films.

*Charge of Court in Applebaum v. Paramount (D. C., W. D., S. Div., Miss. 1951).*

64. A motion picture distributor is not justified in giving preference in the exhibition of its films to a theatre in a community which is part of a chain or circuit of theatres, over an independent theatre, where the independent theatre offers an equal or better opportunity for the exhibition of the films, and the operator of the independent motion picture theatre is willing to meet the terms asked by the motion picture distributor for the leasing of its films for exhibition in that community.

*Charge of Court in Applebaum v. Paramount (D. C., W. D., S. Div., Miss. 1951).*



65. A motion picture theatre obtains no vested right in the early-run exhibition of motion picture films by virtue of the fact it has exhibited motion picture films on an early run in the past; but on the contrary, if a new motion picture theatre in the same community offers an equal or better opportunity for the early-run exhibition of motion picture films, and the operator of such new theatre is willing to meet the terms asked by the motion picture distributor for the early-run exhibition of those films, then the motion picture distributor is under a duty to give the operator of the new motion picture theatre an opportunity to exhibit those films on an early run either on an exclusive or day and date basis.

*Charge of Court in Applebaum v. Paramount (D. C., W. D., S. Div., Miss. 1951).*

66. The licensing of motion picture films for exhibition by any method upon any run in any theatre in any manner other than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others, is an illegal practice within the meaning of the Sherman Anti-Trust Act.

*Charge of Court in Applebaum v. Paramount (D. C., W. D., S. Div., Miss. 1951).*

. . . . .

69. In considering the power which these defendants have exercised over the distribution and exhibition of motion pictures as a result of their vast theatre holdings I charge you that you must consider them collectively in that regard rather than independently or individually.

70. These defendants have been found by the court in the Paramount case to have brought about an actual ex-

clusion of independents from the first run field approximating in the aggregate 70% of the first run theatres in the 92 largest cities of the country of which Baltimore, of course, is one.

71. The power possessed by these defendants to fix runs and clearances has been found by the court not only to have existed but actually to have been exercised by these defendants so as to bring about the exclusion of independents who were or wished to be competitors in the first run field.

72. Although these defendants claim the right for themselves to decide what theatre shall be accorded first run pictures or to decide what clearance should be granted a particular theatre, I charge you that in reaching your decision in this case you should bear in mind as an important point that these same defendants have been found guilty of abusing their discretion in making these same decisions as a consequence of which they have been found guilty of violating the antitrust laws.

73. The history of the motion picture industry and the notorious past proclivity on the part of these defendants for conduct which has been violative of the antitrust laws are such that the court has hitherto recognized a strong temptation on the part of these same defendants to continue their same illegal distribution practices.

74. By reason of their theatre holdings all over the country it has been found to be a fact by the court that the best customers of each of the big five defendants were ordinarily one or more of the other defendants.

75. The defendants here have all been convicted, in a suit by the government, of conspiring to fix uniform runs and clearances and of imposing unreasonable clearances.

76. The theatre owning defendants, Warner, Paramount, Fox, Loew's and R.K.O. have all been convicted of

engaging in the fixing of runs and clearances in order to limit the competition which independent exhibitors could give to the theatres owned by these defendants.

77. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants have frequently worked to the disadvantage of independent exhibitors trying to compete with theatres owned by the defendants or by large circuits or other favored exhibitors.

78. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants frequently worked to the disadvantage of exhibitors trying to break into the field with new theatres and compete with exhibitors who were old customers of the defendants.

79. It was adjudicated in the same suit that all the defendants had failed to live up to their legal duty of licensing motion pictures solely on the basis of the merits of the theatres involved, but had instead for various reasons discriminated against some exhibitors in favor of others in the runs and clearances granted their theatres.

80. The decree in the case of *United States v. Paramount, et al.*, which has been introduced here, constitutes *prima facie* evidence that the defendants were guilty of the wrongful conspiracies and conduct which have just been stated to you. This means that unless the defendants have introduced credible evidence sufficient to convince you to the contrary, you must accept as true that the defendants engaged in the conspiracies and illegal conduct as aforesaid.

81. The Court instructs the jury that if it finds that the Crest was not in substantial competition with the theatres located in the downtown area of Baltimore City and that the Crest requested an opportunity to license pictures day and date with those theatres located in the downtown



area, and that the distributor or distributors refused so to do, then the jury should find a verdict for the plaintiff in the first cause of action. The jury is further instructed that it is not necessary for both theatres to be under common ownership to be entitled to play day and date; further every distributor is legally bound to license pictures only on a picture by picture basis and theatre by theatre basis which means that it is illegal to consider whether an exhibitor operates only one theatre or more than one theatre as a condition of licensing it pictures.

. . . . .

83. I charge you that the distributor defendants are under a duty to license their product picture by picture and theatre by theatre without discrimination in favor of affiliated theatres, circuit theatres or others.

84. In so licensing their pictures the distributors may not take into consideration other than the particular picture and consequently may not withhold a particular opening date because of some supposed overall effect flowing from the playing of other pictures.

. . . . .

90. I charge you that as a general principle the farther a theatre is from a focal point the less competition it represents to a theatre at the focal point and the less justification there is for clearance between those pictures.

. . . . .

93. The distributors have the burden of establishing the reasonableness of the clearance imposed on the Crest.

[fol. 304] APPENDIX TO BRIEF OF APPELLEES

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH  
CIRCUIT

Testimony

HARRY D. MYERBERG,

Cross-examination.

Mr. Raftery:

Q. Mr. Myerberg, on the first day of your examination, in response to Mr. Rome's questions, you told us about a conversation you had with Mr. Benson of Paramount in regard to the Paramount Theatre at Kansas City. Do you remember that testimony?

A. Yes sir.

Q. Now, will you tell us what that was? I missed part of it.

A. It is in the deposition there, sir. You can read it.

Q. Now, what was the conversation?

A. The conversation was to the effect the Paramount Theatre, the Neumann Theatre, at Kansas City, had played Paramount pictures on exclusive first-run and was located out of the downtown area, and Mr. Benson told me at that time he knew about that.

Q. Now, you also said you had the same conversation with Mr. Brecheen, and told him about the Paramount Theatre in Kansas City.

A. Yes, sir, that is correct.

Q. And they told you they knew all about it but that was a horse of a different color, or something to that effect?

A. Yes, but later I found that wasn't a fact. I was mistaken in that situation. It was Fox in Kansas City that was playing day and date with downtown, as I understood it. Although I had a recollection of Paramount doing that, I cannot seem to substantiate that.

Q. As a matter of fact, the Paramount Theatre in Kansas City, instead of being way out in the country—

A. Where is the Neumann Theatre, sir?

[fol. 305] Q. At the corner of 12th and Main.

A. I was mistaken, I understood that was a fact.

Q. Let us go to Washington. Yesterday you moved the Ontario Theatre from Columbia Road to Connecticut Avenue; is not that correct?

A. I did not move it. Connecticut Avenue slipped out instead of Columbia Road.

Q. But you are thoroughly familiar with that situation?

A. I would not say that I am thoroughly familiar with that situation, but I know where Columbia Road is. I know the theatre, I know the area around there fairly well. I will not say that I know it completely, but I know enough about it to know how to get there and what surrounds the theatre.

Q. You testified yesterday that Fox was selling its pictures exclusive first-run to the Ontario Theatre, that is, exclusive first-run, Washington, on competitive bidding basis; is not that right?

A. Either competitive bid or competitive negotiation, yes, sir.

Q. And what was the picture you told us that was playing there or just finished playing there at the Ontario Theatre?

A. The new picture based on the life of—*SONG IN MY HEART*.

Q. The life of Jane Frohman?

A. Jane Frohman, yes.

Q. One of Fox's biggest releases; right?

A. Yes, sir.

Q. And a very successful picture?

A. Yes, sir.

Q. Would it surprise you if I were to suggest to you that the picture *SONG IN MY HEART* has just finished playing for four weeks at Loew's Palace at downtown Washington on an exclusive first-run?

A. Yes, sir, it would, because the information came from the operators of the Ontario Theatre.

Q. You have been in touch with the operators of the Ontario Theatre?

A. Yes, I have. I know them and have talked to them. I have talked to them a number of times and with others, too.

[fol. 306] Q. And you contemplated calling them as witnesses in this case?



A. Yes, we did.

Q. Now, you do not dispute the fact that *SONG IN MY HEART* has just finished playing at Loew's Palace Theatre, did you?

A. If you say so, sir, I will take your word for it.

Mr. Raftery:

Q. Mr. Myerberg, in your request for first run, day and date with downtown for exhibition at the Crest, you were seeking the same run from each of the eight distributors? Isn't that right?

A. I was seeking the right to play their pictures on that run, yes, sir.

Q. You were seeking the same uniform run, insofar as each of the eight was concerned—first run day and date?

A. First run day and date, or first run exclusive, depending upon how the distributor wanted to sell me films.

Q. You were seeking the same from each of the eight whether first run day and date or first run exclusive? Is that right?

A. I was requesting a right, to permit access to their films, yes, sir.

Q. First run?

A. First run day and date, or first run exclusive. That is correct, yes, sir.

Q. You were seeking uniformity as to that, anyway? Isn't that a fact?

A. I was asking each of them, yes.

Q. Now, Mr. Myerberg, in seeking the uniform matters from each of these distributors, you were not seeking to enter into any conspiracy with any of them, were you?

A. I couldn't enter into a conspiracy with myself, Mr. Raftery.

Q. I asked you if you were trying to enter into a conspiracy with these defendants?

A. I was one person seeking a uniform thing, as you say, from all of these people. I don't see how I could enter into a conspiracy on that.

[fol. 307] Q. Mr. Myerberg, when you went into the neighborhood where the Crest Theatre was located and opened up that theatre, or started to, that corner was a vacant piece of property from Rogers Avenue down to the white house which is immediately south of your theatre? Is that right?

A. Yes, sir.

Q. And crossing the road, on Reisterstown Road, there was also a vacant piece of property where now you have a lunch wagon and a used car lot?

A. Well, there is a used-car lot and a restaurant over there, yes, sir.

Q. At the time you started up there, the lunch wagon or restaurant was not there, was it?

A. No. There was commercial property directly opposite us, and houses behind that.

Q. But the property on Reisterstown Road, in the rear of the gas station corner, was all vacant?

A. I would say on the side of the gas station, between that and the next street was vacant.

Q. Going down Rogers Avenue towards the Ambassador Theatre, on the right, how far from that corner is the Western Maryland railroad crossing?

A. I have never checked it, but I would say between three-tenths and five-tenths of a mile.

Q. Immediately west of the railroad crossing, on the right, on Rogers Avenue, what was there then and what is there now in that locality?

A. At that time, I think it was vacant land; now, there are homes.

Q. On the right-hand side of the street, immediately adjacent to the railroad crossing, is a fairly large patch of woods that was there then and is there now?

A. No, sir, not a fairly large tract of wood. I think there is some right-of-way that the railroad owns there, and almost up to the railroad, and I would say almost within a couple of hundred feet, there are homes.

[fol. 308] Q. Now, I think we are confusing each other.

A. I am talking about the north side of Rogers Avenue, west of the Western Maryland Railroad tracks.

Q. Isn't it a fact the first thing, then, is the cemetery?

A. No, the cemetery adjoins the houses I was just speak-

ing of. That is still farther west, and the cemetery has a frontage on Rogers Avenue of, I would say, between 300 and 500 feet. I have never checked it.

Q. Well, there is a large cemetery there?

A. There is a large cemetery there, but I do not think a very large one, a new cemetery, put there in the last year or two, maybe three. I don't know how long it has been there.

Mr. Boyd:

• • • Mr. Rome's letter of November 1st, sent from his Philadelphia office to the Paramount Pictures, was the first one, which has been marked Defendants' Exhibit 7; and I will read Defendants' Exhibit 7:

"November 1st 1949

"Paramount Pictures Inc.

"Times Square

"New York 18, New York

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc., of Baltimore, Maryland, which operates the Crest Theatre at Reisterstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities of [fol. 309] fered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in



the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated.

"Yours very truly, (Sgd) Edwin P. Rome."

Now, in order to have the reply to that letter, I will read Defendants' Exhibit 8, which is a letter from Thomas P. Gibbons, of Paramount Pictures Incorporated, Times [fol. 310] Square, New York, addressed to Mr. Rome. "Re: Crest Theatre, Reisterstown Rd. Baltimore, Md.", as follows:

"Gentlemen:

"Reference is made again to your letter of November 1st in the above matter.

"Your opening paragraph indicates that you have made a study of and are acquainted fully with the facts of this controversy. In light of this, we feel that it will be unnecessary to review them other than to mention again that the Crest is situate in a suburban area more than six miles

from downtown Baltimore and has a seating capacity of approximately 1650.

"The request made in behalf of your client, together with a few others of like nature, have necessitated the re-examination of basic economic principles on which the well being of all branches of the motion picture industry are founded. We have approached the problem presented with the idea of being ready and willing to accommodate ourselves to a basic change in the economics of the industry if good business judgment should warrant our taking such action.

"You suggest and urge that we conduct an experiment and play our pictures first run in the suburban Crest Theatre. In the second and third paragraphs of your letter, you advance several reasons why you feel that such an experiment should be made. Your argument would seem to assume that there is something improper in our conduct in licensing, and preferring to license, our pictures for first run exhibition in a large downtown theatre, instead of in a suburban house; that the downtown first run exhibitor has lost his right to protect his investment; that Paramount, as a distributor, has no right to distribute its pictures in such manner as it believes will best serve both its own and the public interest and that it should experiment as you suggest. We cannot concede the soundness of this argument.

[fol. 311] "We have considered your suggestion and carefully reviewed all of the facts and factors involved. After due consideration, we have to advise that our prior decision remains unchanged; that it shall continue to be our policy and in the exercise of our sound business judgment, we feel the interests of both Paramount and the public will best be served by the continued exhibition of our product first run in the large theatres situate in the downtown business and shopping areas of a city, rather than in a theatre located in a suburban area, as is the Crest.

"There are several factors which enter into consideration and seem to indicate that the above decision is the correct one. That large first run theatres are situate in the downtown business and shopping areas is not the result of accident, but rather due to the careful consideration of various business factors, such as location, transportation, the audience, exploitation and prestige, among others.

"Every community, whether it is a city, town or village, has a hub, which is the center of all activity. The city of several millions, such as New York, has its Broadway and the village of a couple of thousand has its Main Street, but whether it is Broadway, or Main Street, it constitutes the center of activity to which all persons come sooner or later for various purposes. In the large cities and towns the large first run theatres are located in the very heart of these centers where are to be found the great masses of the population.

"All highways are designed to reach and all public transportation, subways, trolleys and buses lead to these centers of population.

"The audience of the downtown house represents a cross-section of the population. Some of the patrons come by auto or cab, others by subway, bus or trolley, still others on foot. It is comprised, at one time or another, of the amusement seeker and of the business man or woman, the resident and the transient.

[fol. 312] "The large first run downtown theatres are operated under a very sizable overhead such as rental, extensive advertising, the maintenance of large staffs, etc. The operators of these theatres are willing to pay large film rentals. In order to enable them to carry the burden of such an operation, they must and do attract large audiences. The fact that the large first run theatres are situated in the centers of activity where are to be found the great masses of population is valuable not only from the standpoint of attracting first run patronage, but of even greater value from the standpoint of achieving wide spread publicity and prestige for a picture so as to arouse the interest of potential theatre goers where they will see the picture either on first or subsequent run. The industry recognizes that word of mouth-exploitation is a most valuable factor in attracting patronage. The audience at the large first run downtown theatre carries the message as to the entertainment value of the picture being exhibited to the far reaches of the city and beyond. This leads to the building up of both revenues and public consciousness of the value of the picture which benefits in turn not only the distributor but also all exhibitors who show the picture on a later run.

"Lastly, our experience over a long period of years has



convinced us to our complete satisfaction that suburban theatres could not possibly yield the revenue which large downtown theatres return on first run exhibition. In considering your request, our Sales Executives have weighed carefully the grossing possibilities of your client's theatre in light of its previously demonstrated earning capacity. On two separate occasions heretofore, your client made two very extravagant guarantees for the first run exhibition of two of our pictures. In order to justify the guarantees, the Crest would have had to increase its business some twelve and one-half times. Our Sales Executives feel that the amount of the increase involved is totally disproportionate to the actual possibilities. They feel further, based upon their many years of experience, that it is unfair to ask them to conduct the experiment which you urge when all factors [fol. 313] are so definite and clear cut as to indicate only one possible result, namely, a loss not only to Paramount but also to your client.

"In view of what has been said above, we have to advise that we must refuse your request for our product for exhibition first run in your client's Crest Theatre.

"Yours very truly, (Sgd) Thomas P. Gibbons."

(The Court) By the way, if I may interrupt further, you gave me a brief but you have never given me the marked copies of the decrees which I asked for.

(Mr. Rome) I have them and they are marked, sir. I did not know Your Honor wanted them submitted at that time. I thought I ought to renew my primary offer of them.

(The Court) I have to have them before me before I can determine anything more about your proffer.

(Mr. Rome) They are here, and those portions which I seek to offer in evidence are marked in red. They are only the applicable portions, raising the same issues which we contend are raised in the present case.

## DR. EDWARD HAWKINS

## Cross-examination:

Q. So far as you are concerned, a theatre located anywhere outside of the downtown or in the downtown area may be equally suitable as a first run motion picture theatre?

(The Witness) If I must answer that from a marketing and economic point of view, I would say no.

[fol. 314]

WILLIAM ZIMMERMAN

## Direct examination:

Q. Now, to the best of your recollection, tell the Court and jury in substance what transpired at that time. First, let me ask you, if I may, when the conference began, what was the nature of the run, if any, which was being requested or sought by Mr. Meyerberg?

A. Well, it is very difficult now, four years later, to try to be exact as to a conversation. I can only say at that conversation there was a request for either exclusive first run, and in the alternative a request for day and date first run. However, during the conversation the motion picture *JOAN OF ARC* became the subject of a request by Mr. Meyerberg, and in that instance my definite impression was that he wanted *JOAN OF ARC* either as a World Premiere or as a very early opening engagement to play exclusively first run in his Crest Theatre.

Q. Now, will you continue your recollection?

A. We had, I would say, a rather thorough discussion of his theatre, he described his theatre in great detail, the plans, the character of his theatre, the modern conveniences that were being installed, the type of community, the Hill Top community they were serving.

I think that as a part of this whole project there was this community project of stores. It was going to be a shop-

ping center. And he was most articulate in presenting his view, I thought, and I thought very competently.

I, on the other hand, remained unpersuaded because it seemed to me that he had in essence, however nice a theatre it was, however modern, he had a neighborhood theatre, serving a limited neighborhood area, and that, one, certainly in a show case city of the type of Baltimore, we are not going to use as a show case for our pictures, a neighborhood house. I indicated that to him. With respect to his request for a day and date run, I had discussed the matter at some length over the phone with Mr. Brecheen and inquired as to whether or not the first run downtown theatres [fol. 315] drew substantially from all areas of Baltimore, and Mr. Brecheen said they definitely did, so that for me to seriously consider, or for RKO to seriously consider the Crest Theatre a day and date run theatre with downtown, we had to look away from all the legitimate considerations with respect to the first run downtown theatres, eliminate clearance, even though the theatres were substantially competitive, and generally, it seemed to me, discriminate with respect to the Crest Theatre, with no compensation for doing so.

A. As I said before, Mr. Watkins, I cannot tell you my recollection in specific words, because I cannot remember. I can tell you the substance of what I said. Now, the substance of what I said to him was that we thought in marketing our pictures in the large cities, the key cities, we found that it was preferable to license our first run in the downtown area for a number of reasons: First of all a theatre in the downtown area is centrally located, it is located where the masses of the people are found for their entertainment. It is easily accessible from all areas of the city. It is in the mind of the public, in the minds of the exhibitors, that an important picture has its first run in a large city in the downtown show case. If the picture is shown first run in a large city in a neighborhood house, it is tagged as an inferior picture. So that on subsequent runs, instead of getting large film rental, we get small film rental. We must think in terms, when we are marketing a picture in a large



city, like Baltimore, we must think not only of the first run exhibitions, we must think of all the subsequent run exhibitions. For example, in the City of Baltimore I think we have about 60 theatres.

Q. You say "we".

A. I think the City of Baltimore has 60 theatres. When I say, "We", I mean we solicit 60 theatres. In addition, I think there are about 40 theatres in the surrounding areas of Baltimore.

Now, if we have a successful picture in its first run, that has an important showing, then we can be successful in obtaining adequate terms from the exhibitors operating the 60 theatres in Baltimore, and the 40 theatres in the surrounding territory. So, we have not only a question of the immediate revenue obtainable from the first run, we have, which is frequently much more important, we have the first run as an exploitation device, to set up the importance, the desirability of seeing the picture in the mind of the public and, therefore, the desirability of licensing it in the minds of the various exhibitors operating in Baltimore.

Now, that is the substance of what I told Mr. Myerberg.

Q. (Mr. Watkins) I show you Plaintiff's Exhibit 20, Mr. Zimmerman, and call your attention to the fact that this contains a confirmation or purports to contain a confirmation of an oral bid, stating Theater Enterprises, Incorporated, agrees to pay 55 per cent of the first \$8,000 gross box office receipts and 65 per cent of all over \$8,000. "We will also place any reasonable guarantee, the figure to be mutually agreed upon." Was that offer accepted?

A. It was not.

Q. Will you tell the Court and jury why the offer was not accepted?

A. Frankly, we thought that we could make more money by licensing the picture first-run downtown. As a matter of fact, I think the film rental we obtained from the exhibitor, from the, I think it played the Town Theatre, was \$21,000. In addition to that, we frequently get offers, when an exhibitor wishes to make a point, he will say, "I will pay you X Dollars, or will give you any kind of reasonable

guarantee"; and assuming you do get the guarantee, and the picture does not do well in his theatre, it is traditional in our business to make what we call adjustments. It is a custom, when we are licensing motion pictures, if an exhibitor has an unsuccessful engagement, he can come to our office, and to the offices of the other distributors, and we are willing to give him a reduction in the film rental, because it turned out to be unprofitable. So, the fact that an exhibitor [fol. 317] offers a guarantee, or offers a very attractive term, is not completely persuasive.

A. We know, that if we do put a picture in a neighborhood area, it is deemed as an inferior picture, and the exhibitors give us their lowest terms.

Q. I have difficulty, Mr. Zimmerman, without attempting to argue in following you, in reaching your conclusion—

A. Now, wait just a second. I told you we couldn't—I don't know what I said to you—our preference, when we have a downtown outlet, we would prefer to sell that first-run. There are situations where we cannot get our preference. I don't have to go through all that, as to why. Then we market it as best we can.

Now, marketing as best we can, we try to get as much money as we can. If the only place we can put the picture would be in a neighborhood house, we put it in a neighborhood house. The effect of putting the picture in a neighborhood is, as I have told you.

JOSEPH B. BRECHEN

Direct examination.

Q. Your recommendation was for a first neighborhood run?

A. That is right.

Q. What was the reason for that?

A. Well, I looked at the theatre and its location, and I thought then, and I think now, that it is a very fine neighborhood theatre; but it is one of a number of fine neighborhood

theatres in the City of Baltimore, and deserving of no special privileges not accorded other profitable neighborhood houses.

Q. Is there any place within your Washington branch area in which a downtown theatre and a neighborhood theatre play day and date on RKO pictures?

A. Yes, I have one.

Q. Where is that?

A. Richmond, Virginia.

Q. What are the circumstances?

A. Well, the circumstances are entirely different from the situation with respect to Baltimore. First of all, that [fol. 318] run was built up through a series of circumstances, and it has existed over a long period of time. Years ago, the company was unable to find an outlet for its pictures in the mid-downtown area; so we did the best we could with our product, and we sold it first run in what was then and is now the Byrd, which is, I guess, two to two-and-a-half miles from the downtown area, but in a very heavily congested center of its own, with a good shopping center around it.

Later, when ownership of the Byrd was acquired by its present management, they had a downtown house, a very small one as compared with the Byrd, and over a period of years we created a day and date run in the two houses, and gives them a chance at revenues from those people who come from the opposite side of the city, as respects the location of the Byrd Theatre, but will not go all of the way through town and across town to see a picture.

It is our belief that people flow normally from all sections of the city into the heart of the city, but they will not flow all of the way across the city, through heavy traffic, to get something they can get nearer home.

So, the downtown theatre is inferior to the Byrd, but it does give us added revenue on a picture and a better chance at the income than if we played one house alone.

Q. You could not get downtown when you started?

A. We could not get downtown.

Q. Are there any instances in your Washington branch area, Mr. Brecheen, in which neighborhood houses have played day and date on first run?

A. Yes, I have two.



Q. What are those?

A. In Norfolk, Virginia, I sell two neighborhood theatres day and date first run, and in Roanoke, Virginia, I sell two very fine neighborhood houses first run. But in Roanoke they are the only neighborhood houses in the city.

Q. Was there available to you in Roanoke a downtown outlet for your pictures?

A. No, sir; there never has been.

Q. Is there at the present time?

A. No, sir.

[fol. 319] Are the two neighborhood houses commonly owned?

A. Under common ownership.

Q. I believe you said that was true in Richmond?

A. Yes, that is true in Richmond, that is true in Roanoke, and it is true in Norfolk.

Q. What is the situation otherwise in Norfolk?

A. In Norfolk we could never get a downtown first run; we were locked out; so we created a first run day and date in two neighborhood theatres, which probably offsets what we could not get downtown.

Q. In all three cases you were not able to get downtown outlets?

A. That is right. So we created the best market we could for our pictures.

Q. Would you prefer to have a downtown outlet to the method in which they are being played?

A. Yes, sir.

Q. Do you regard the cities as such, Richmond, Norfolk, and Roanoke, comparable to Baltimore?

A. No, sir.

Q. Are the subsequent runs of those cities of the importance that the subsequent runs are in Baltimore?

A. Oh, no. In Roanoke there are no subsequent run theatres, other than the theatre that plays first run products. They are not subsequent run houses. They are neighborhood houses that play first runs. There are no subsequent run theatres in Roanoke at all.

Q. It is where you play the first time?

A. That is right. In Norfolk there are very few subrun theatres. The subrun revenue in Norfolk is very negligible.

as compared with a city like Baltimore. In Richmond there are only 5 or 6 subrun theatres, which are owned by the same people that buy our products first run.

CHARLES V. GRIMES

Direct examination.

Q. Now, on the draw area of the Ambassador Theatre as contrasted with the draw area of the Crest Theatre out here on Reisterstown Road, what is your opinion as to the [fol. 320] density of the population and draw area in the two areas?

A. In the Washington area, with which I am very familiar, the density of population there is very heavy due to the number of apartment buildings. It is in an apartment section. There are very large apartments throughout the entire area. Connecticut Avenue and 16th Street. In the Crest Theatre section of Baltimore—I am not as familiar with the City of Baltimore as I am with the City of Washington, however, I have been through that section quite thoroughly—to me I would say that the Ambassador area is two to one in density.

## DEFENDANT'S EXHIBIT No. 19

## COMPUTATION OF NET LOSS OF CREST THEATRE, BALTIMORE \*

Gross at Stanley Theatre, Baltimore, during claimed damage period, February 25, 1949 to March 23, 1950 (56 weeks) . . . . .	\$406,308.24	
Ratio of gross of Ambassador Theatre, Washington, to gross of Warner Theatre, Washington, during period December 25, 1949 to December 30, 1951 (6 years) . . . . .	47.0%	
Gross applicable to Crest Theatre, Baltimore . . . . .		\$190,964.87
Less expenses:-		
Film rental—35% of \$190,964.87 . . . . .	\$ 66,837.70	
Operating expenses—56 weeks at \$2,500 . . . . .	140,000.00	206,837.70
Net loss during claimed damage period . . . . .		<u>\$ 15,872.83</u>

\* Based on comparative grosses at Warner and Ambassador Theatres, Washington. (See statement attached.)

[fol. 321] Cross-examination.

Q. How many theatres are there, in all, that are operated by the Warner Bros. Circuit Management Corporation?

A. You mean nationally?

Q. Yes.

A. Well, as far as I know, there are in the neighborhood of approximately around 400 theatres.

Q. Do you know how many of those 400 are first-run theatres?

A. I would not know.

Q. Many of those theatres are located in the downtown sections of large cities, are they not?



A. There are theatres located in the downtown sections, but certainly the majority of them in your larger cities, I would say, would be neighborhood theatres.

ROBERT SMELTZER

Direct examination.

A. Well, the location, the transportation facilities. They have a small shopping district, but I do not think it would attract anyone but the neighborhood people. I do not think anyone would travel from South Baltimore or Southeast Baltimore, or possibly East Baltimore, over to the Crest Theatre to see a first run picture. I think his patronage would be drawn purely from that location where he is, and possibly over as far as the Ambassador or Reisterstown, or about the area that Mr. Myerberg stated his drawing area is—Park Circle—drawing first run pictures. That would be my idea of his drawing area. I do not think he could draw from the entire City of Baltimore for first run pictures. I do not think it is possible. So, I would not consider it as a first run outlet for Warner pictures.

Q. Did he ever ask you for a day and date first run with downtown?

A. No. He never asked for day and date first run. He was primarily interested in an exclusive first run. The day [fol. 322] and date issue never arose, to my knowledge never arose.

ALEXANDER LIGHTMAN,

Direct examination:

Q. (Mr. Raftery) \* \* \* Can you tell His Honor and the jury what happened in Cincinnati, what your experience was, and what the result is, today?

A. We were selling our pictures first run to a firm—I don't recall the corporate name, but it was operated by two men, Mr. White and Mr. Lion, and they operated three theatres downtown. One of them was closed at the time I

speak of—the Shubert was closed—and they were operating the Capital and the Keith. The Capital was the best theatre of the three. Certain subsequent-run exhibitors, and one operator of a drive-in theatre, demanded that we reduce the clearance of the first-run; the clearance then established was the fifth Sunday after the completion of the run in the Capital or Keith Theatres. They demanded that their clearance be reduced to 21 days, so our representative went to Mr. White and asked him to agree to this, which he refused; and he further stated that if we insisted on reducing his clearance, that he would not buy our pictures. And, after many negotiations, he still persisted in that position. The exhibitors making the demand for this clearance had threatened at that time, and subsequently did file a lawsuit against all the film companies, for three million and some-odd thousand dollars, treble damages, because of the unfair clearance they claimed. So, our representatives, after they were told by Mr. White that he would not buy our pictures with the reduced clearance, went to these exhibitors and negotiated with them to play our pictures simultaneously in those four theatres, plus this one drive-in, first-run, in the city of Cincinnati, because, after Mr. White refused to buy our pictures, we had no other outlet; and we said we would try it, and we sold them 14 pictures. And, when we sold them those 14 pictures, they took us out of the lawsuit; but they proceeded with the lawsuit against the other companies.

[fol. 323] Now, then, during the time that we were playing these pictures with these four theatres, the subsequent-run theatres, and the drive-in, we had all sorts of difficulties. Some of the theatres only wanted to play the pictures three days, while others would play it for a full week, which was the provision of the contract. In other words, it was difficult to get them to agree; and, furthermore, we found that we did not earn as much money as they promised us they would, as we earned with first-run on comparable pictures. And, when the contracts for the 14 pictures expired, we went back to sell our pictures with the reduced clearance.

## GERALD P. PRICE

## Direct examination:

Q. As a matter of fact, during your stay here as manager of United Artists, you sold the great bulk of your pictures to the Mayfair Theatre, Baltimore?

A. That is correct. As a matter of fact, we sold them to practically every downtown theatre.

Q. Did you have any national policy or policies in your area as to either selling downtown, or uptown, or suburban, or in any way, in this area?

A. We sold where we got the most money.

Q. As a matter of fact, down in Roanoke you were not able to sell any pictures downtown, were you?

A. That is correct.

Q. Do you know the reason?

A. Yes.

Q. What was it?

A. There was a breach of contract, and the owner of the American Theatre was taken into court, and a decision handed down against him; and, for that reason, he was mad at United Artists from that point on, and he would not buy their product, regardless of what stature it was.

[fol. 324]

C. GLENN NORRIS

## Direct examination:

Q. Is that, in your opinion, of any importance in connection with establishing a picture for subsequent-run?

(Mr. Rome) Is what of any importance?

(Mr. Watkins) Exploitation of the picture in the downtown first-run theatre.

(The Witness) As a matter of fact, it is of vital importance. In an area like Baltimore, the first-run "showcase", as we like to refer to it, is important in more ways than just the amount of dollars we might earn through the exhibition of the picture in that particular run, because during the showing of the picture on the first-run, the picture is sold to an entire area of in excess of a million people, a small



percentage of whom actually see the picture on the first-run; but we know from experience that the most valuable medium of advertising is the word-of-mouth advertising, the praise of a picture on the part of a person who has seen the picture, to one who has not; and that word-of-mouth advertising is—again, I am using a trade expression—is of vital importance to the success of a picture, not only in the subsequent-run theatres in the immediate city, but in all of the outlying communities that are served by a city like Baltimore as a central shopping center.

. . . . .

Q. You can have a day and date with one subject, can you not?

A. With one, and I think one of the most important things we are all overlooking here, no matter what distributors might have in mind with regard to a picture, whether it might be a film rental or availability or whatever it might be, it is no good unless he can get an exhibitor to buy it on that basis.

Q. You could not get downtown to buy on the basis of playing simultaneously with neighborhood houses; is that correct?

A. That is absolutely correct.

[fol. 325] Q. Have you played any Fox pictures at the Ontario since the date of this letter?

A. Yes; we played two pictures at the Ontario.

Q. Will you very briefly state the reasons for playing them, what they were, and what were the results?

A. The reason for playing them was it developed that the Ontario Theatre was the only available one we could get for the picture. We could not sell it to the Palace, and we could not sell it to the other downtown theatres, including the Playhouse, Plaza, Trans-Lux, and so on. The Ontario Theatre was available for a first run. They offered us a contract film rental for the picture, and we licensed it to them, and they played the picture.

. . . . .

### Cross-examination:

Now, what you have stated as being law—I am not a lawyer—I cannot sell a day and date run without taking into consideration two different exhibitors, and I cannot sell a day and date run without selling at least two exhibitors. Otherwise, it cannot be day and date. I did not want to sell the Crest Theatre exclusive first-run, because, for obvious reasons, it is not a suitable first-run showcase for pictures. I could not sell it a day and date run, because I couldn't get another suitable theatre to go with it.

•   •   •   •   •   •   •

SAM GALANTY

### Direct examination:

A. My opinion then and my opinion now was and is that the Crest Theatre is a neighborhood house.

In deference to the theatre, I will say it has fine appointments, a well constructed theatre, but I believe that the location in which the builders elected to place the theatre is unquestionably in a neighborhood that did not show, in my [fol. 326] opinion hope of having too much of so-called patronage, too heavy patronage that would justify such a theatre.

•   •   •   •   •   •   •

Q. Now, there are within your territory three instances outside of the City of Washington in which you do not play your pictures exclusively in a downtown theatre. I wish you would briefly explain the situations in Richmond, Norfolk and Roanoke with respect to the playing of Columbia pictures first run.

A. Well, in the instance of Richmond, Virginia, we owning no theatres, that is, Columbia Pictures, we were compelled to find the only market that was available to us. In Richmond, most assuredly, we would have preferred to play our pictures at one of the downtown theatres, but not finding that market, we naturally looked to the only outlet that was available to us. Our account there, Mr. Martin Thalheimer, is a splendid exhibitor, but unfortunately I do not

believe his theatres are capable of yielding to us the returns we might have enjoyed had we been fortunate enough to find a downtown outlet for our pictures.

Q. Now, how about Norfolk?

A. The same thing applies in Norfolk. We tried for many years, and we continue to try now, to place our pictures in a downtown theatre, but we have not been successful in doing so.

Q. And Roanoke?

A. Roanoke, the same situation applies.

Q. Columbia has licensed some pictures for exhibition in the Ontario Theatre in Washington on first run, has it not?

A. That is so, we have.

Q. And in those cases in which you have licensed them first run at the Ontario, have you or have you not had available to you a downtown first run theatre for the exhibition of your pictures?

A. No, we have not.

Q. If you had had available a downtown first-run theatre, would you have preferred to have played your pictures in [fol. 327] such downtown first run theatre rather than at the Ontario?

A. Yes, I should say so.

Q. Do you have a record of your experience of the play of pictures at the Ontario Theatre?

A. I do.

Q. You had experience with five pictures, I believe, Mr. Galanty.

A. At this moment that is the history.

Q. I wonder if you would give us a summary of your experience of the playing of those pictures at the Ontario?

A. The first picture we played at the Ontario was Song To Remember, a picture that was very successful when first issued possibly five or six years ago, but it was delivered to the Ontario as a so-called "reissue."

Q. What were the terms?

A. In the event that the gross of this reissue was less than \$6,000 we were to receive as film rental 25%.

Q. What, in fact, was the gross?

A. The gross was \$4,852 on a 7-day engagement.



Q. And, therefore, the 25 percent rate applied?

A. \$1,213.07.

Q. What was the second picture?

A. The second picture was one entitled Sunny Side Of The Street.

Q. Licensed on what basis?

A. Thirty percent of the gross.

Q. What was the gross?

A. The gross was \$1,983.56.

Q. The picture played what dates?

A. It played December 19 to the 24th, 1951.

Q. What film rental was earned on that basis?

A. \$595.07.

Q. Was any adjustment made?

A. It was reduced to straight 25 per cent. A 5 per cent adjustment was made in the terms.

Q. Why?

A. Well, I should say, because of the extremely poor gross that the exhibitor had experienced.

[fol. 328] Q. What was your next picture?

A. The next picture was TEN TALL MEN.

Q. What were the licensing terms there?

A. The license terms were \$3,500 guaranty the first week against 35 per cent of the gross, with the stipulation that in the event the picture held a second week, we were to receive as terms \$1,500 against 35 per cent of the gross.

Q. Thirty-five or thirty?

A. Thirty per cent, I beg your pardon.

Q. What was the play experience on that?

A. The play experience was that it played in what is considered very choice playing time. It opened December 25, 1951, and played a week with a gross of \$8,284.70; was held over for the second week to a gross of \$6,131.66.

Q. Did it earn the guaranty in the first week? It had to gross \$10,000, didn't it?

A. It grossed \$8,284. No; it did not earn its guaranty the first week.

Q. Was any adjustment made as to the second week?

A. The second week, we agreed or proposed to adjust it. It has not been approved, but it is now in the home office for consideration, to reduce the terms of the second week to \$1,500 flat.

Q. What is the fourth picture?

A. The fourth picture was **BOOTS MALONE**.

Q. What were the terms there?

A. \$2,500 guaranty against 35 per cent of the exhibitor's gross. The picture played starting January 23 for 7 days to a gross of \$4,349.83.

Q. Against a guaranty of \$2,500 on a 35 per cent basis?

A. Quite right.

Q. And the guaranty was not earned, was it?

A. No, sir.

Q. Was any adjustment made on that picture?

A. We had—I have recommended to the home office that they give consideration to an adjustment.

[fol. 329] Q. The fifth picture?

A. The fifth picture was **DEATH OF A SALESMAN**.

Q. What were the terms on that?

A. The terms were \$20,000 cash guaranty.

Q. For how long a performance?

A. For five-weeks engagement.

Q. Was there a varying percentage on the weeks?

A. Fifty per cent for the first week; 50 per cent for the second week; 40 per cent for the third, and 35 per cent for the fourth and fifth weeks.

Q. Was this picture, **DEATH OF A SALESMAN**, shown to the exhibitor before he licensed it on those terms?

A. Yes.

Q. How long did the picture play?

A. The picture played three weeks.

Q. Who terminated the performance?

A. The engagement was terminated—the exhibitor insisted upon terminating it, based upon the grosses, which were failing so badly that we were inclined to agree with his position, that his position was all that could possibly be expected.

Q. What were the grosses?

A. The first week, \$8,302.53.

Q. The second week?

A. \$4,245; and the third week, \$2,691.

Q. Subject to verification, that is a total of \$15,238.54 gross against a \$20,000 guaranty?

A. Quite right.

FREDDIE MEYERS.

Direct examination:

Q. What was the reason for servicing pictures on a 21-day or first-neighborhood-run availability?

A. The reason, frankly, in my opinion, he was not entitled to the 21 days. For some reason or another, only known to [fol. 330] himself, that this man or his organization decided to put a theatre in the middle, between theatres, in an area which, in my opinion, no theatre was entitled to be at that particular time. Namely, I will be specific on one, and cite the fact that on one side is the Ambassador Theatre, and on the other side the Uptown Theatre, and mentioning the Pimlico Theatre, which was in the same area, but nevertheless we made a decision to service him 21 days after downtown, giving him the same right as anybody else had in that area.

Q. In your opinion, with the building of the Crest Theatre, was that neighborhood overseated?

A. Definitely so. I so told that to the gentleman.

. . . . .

(Mr. Rome) No, sir; you did not correctly understand me. What I wanted to say, and what I believe I did say, was that during the first 12 months of its operation, the Crest Theatre had a total gross admission of \$122,000, and that according to the information furnished us by the defendants, the total gross of the Hippodrome Theatre during the 1948-49 season was \$132,699.

. . . . .

EDWARD K. O'SHEA.

Direct examination:

Q. Well, now, you have first runs in towns as small as what?

A. 500 people. 350 people, I think, is about the lowest I know of. The word "first-run" seems to be kind of a magic expression. You see, a city like Baltimore will take certain clearance which is recognized, over suburban runs



or towns immediately adjacent to the large city, but there could be towns 25 miles from here who could play that picture, immediately, first run in that little, tiny community.

We have—I am talking too much—and we have 280 to 400 prints of a picture. A print might play the Music Hall Theatre in New York, complete that engagement and go upstate to Pawling, a town of 250 and play an engagement, [fol. 331] and then it might come back and be repaired and inspected and then go over to Newark and play first run immediately after the little town in between. There are 6,000 clear first runs with no restrictions on them throughout the country. Really the only restrictions are in large cities, very large cities and surrounding areas, and that could also apply—I would like to put in the record, if there are two towns close to each other, the business goes back and forth, you then might sell one town some product and other companies would sell the other town another company's product, whichever they bought, so they would not be in conflict.

Q. And one town on its product might have clearance over the other town?

A. That is right.

Q. And vice versa?

A. That is right.

Q. But when you said the word "restriction" you meant clearance only?

A. That is right.

JOHN F. MURPHY.

Direct examination:

The theatre is located in an area that is not a shopping area by the widest stretch of the imagination. What is there? A couple of meat markets, a diner, a used-car lot. Where is the opportunity given to the patrons who go downtown and shop around and see what picture he wants to see at the time he wants to go? The downtown areas of any cities are the first run areas, are the main shopping centers where people go and say: "I am going to go to the movie." They are not sure what they want to see, so what is here?

What is there? They look around and they pick one out. Where is that opportunity given to them out at the Crest Theatre? In the second place, how are they going to get there? It is tucked away in a remote corner of the City of Baltimore, and I would think that your patrons would resent having to go out there. Why should they be forced to [fol. 332] travel way out to the Crest Theatre to see a first run picture when they could go downtown conveniently? They can go downtown to shop and the restaurants and have a choice which is denied them at the Crest Theatre.

I honestly do not think the Crest Theatre, with first run pictures, would do as well as they would with second run.

(The Court) How about the question of exhibitors who wished to play day and date with the Crest Theatre?

(Mr. Boyd) That was my next question, sir.

Q. (Mr. Boyd:) Mr. Murphy, as the operator of the Century Theatre, would you license pictures for exhibition in the Century if those same pictures were licensed by the distributor playing day and date with the Crest Theatre?

A. I would not, never.

Q. I assume your reasons are the same you have just given?

A. I would go out of business.

Q. (Mr. Boyd) What reasons would you have for not playing day and date, Mr. Murphy?

A. If the Crest Theatre, in its location, non-shopping area in the country, has the right to buy first run pictures, then there are a dozen other theatres in the City of Baltimore just as good in every way, even better, physically and better located. The Crest is nothing unusual as a theatre. It is just a theatre. There are thousands of theatres over the United States, all over the United States as good or better, second run theatres, than the Crest, I think some of mine.

Q. Mr. Murphy, can you tell the Court and Jury the approximate highest attendance you have had at the Century Theatre in recent years, in a week's time, let us say?

A. The highest I remember is BATTLE GROUND. In one week, the first week, we played to over 37,000 admissions. [fol. 333] Q.-And that stayed on for a subsequent play?

A. Yes, I think on BATTLE GROUND our total admissions on the downtown run were over 63,000 admissions in Baltimore.

. . . . .

(Mr. Raftery) On Exhibit 29, down here, is the name of each of the distributors distributing pictures, and named a defendant in this case. Across the top are the names of the theatres.

The first one is the Hippodrome, operated by Mr. Rappaport, who is not a defendant in this case.

The second one is Keith's Theatre, operated by Mr. Schanberger, who is not a defendant.

Then we have the Town Theatre, operated by Mr. Rappaport, who is not a defendant.

Then we have the New Theatre, operated by Mr. Mechanic, who is not a defendant.

Then we have the Stanley Theatre, operated by Warner Bros. Circuit Management, which is a defendant.

Then we have the Century, operated by the Defendant Loew's; and the Valencia, a theatre Mr. Murphy just talked to us about, a move-over house.

Then we have the Little Theatre, operated by Mr. Rappaport, who is not a defendant.

Then we have the Parkway, which is operated by Loew's.

Then you have the Times and Roslyn, which are two houses up away from the downtown section, operated by an independent, Zeller.

And, at last, we have the Mayfair, which is operated by Mr. Hicks, who is not a defendant.

. . . . .

Summarizing, the Hippodrome played these pictures that are listed down this column here, which indicates they played pictures released by Universal, Columbia, Warner, [fol. 334] Paramount, RKO, United Artists, Fox, and Loew's, the total number of pictures listed during the three years.



In the second column is Keith's, playing 101 pictures released by United Artists, Paramount, Universal, Fox, and Loew's.

In the third column shows the Town Theatre, which is a Rappaport Theatre, and they played 83 pictures during this period, released by Universal, Columbia, RKO, United Artists, and Loew's.

In the New Theatre, operated by Mr. Mechanic, he only played pictures released by Fox, or a total of 74 pictures for that entire period.

Now, the Stanley played a picture released by Universal, 83 by Warner's, 18 by Paramount, 2 by United Artists, and one by Loew's, or a total in the Stanley of 105 pictures for the whole period.

The Century played 21 released by Universal, 16 by United Artists, and 80 released by Loew's, or a total of 117 pictures.

The Valencia played 14 Universals, 12 United Artists, one Fox, and 7 Loew's, or a total for the whole period of 24 first run pictures.

In the Little Theatre, they played one Columbia, one from Paramount, one from United Artists, two from Fox, a total of five pictures; and that is a Rappaport Theatre.

The Parkway played one first-run picture during the entire period, and that was a Loew picture.

The Times and Roslyn played 5 pictures, and they were all United Artists.

The Mayfair played 6 pictures from Universal, 6 Columbia, 2 Warner, 17 Paramount, 20 United Artists, 6 Fox, and 3 Loew's, or a total for the period of 60 pictures.

And, now, adding the total pictures played in the area, 416 were played in the so-called independent houses, and [fol. 335] 247 were played in the Stanley, Century, Valencia and Parkway, which are the houses owned by the defendant-exhibitors in this case. In other words, 63 per cent of the first-run pictures shown downtown Baltimore were shown in independent houses, as against 37 per cent shown in the Stanley, Century, Valencia and Parkway.

**JEROME ADAMS.**

**Direct examination:**

**Q.** Now, Mr. Adams, from his visit at that time, what did you understand he was seeking?

**A.** On Mr. Myerberg's original visit, I was of the opinion that he was seeking a first subsequent run. I will tell you why. Mr. Myerberg told me of his previous experience in the picture business, and he was aware, being a Baltimorean, that we had Loew's Theatre, and we utilized our products first run in the city; and, consequently, it was inconceivable to me at that time that he meant first run City of Baltimore.

**Q.** When did you gain the other impression?

**A.** When we received a letter asking for the World Premier of a motion picture in the Crest Theatre.

. . . . .



[Vol. 336]

DEFENDANTS' EXHIBIT No. 32

Loew's Pictures Played at Crest Theatre Under Guarantees

Title	Playdates	Day of Week	Contract Terms	Gross Receipts Reported	License Fee Paid
Duchess of Idaho	9/9-15	Week	2000, 50% ov. 4000	2513.	2000.
3 Little Words	9/30-10/5	SSMTWT	1600, 50% ov. 5750	1967.	1600.
Summer Stock	10/21-25	SSMTW	1500, 50% ov. 4000	1794.	1500.
Life of Her Own	11/5-7	SMT	500, 50% ov. 1800	836.	500.
Toast of New Orleans	11/25-27	SSM	500, 50% ov. 1600	1138.	500.
Right Cross	12/3-6	SMTW	500, 50% ov. 1600	879.	500.
To Please a Lady	12/10-13	SMTW	500, 50% ov. 1600	630.	500.
King Solomon's Mines	1/21-27/51	Week	1200, 50% ov. 3200	2582.	1200.
		00 Units		12,331	8300.
Total Guarantees			8,300		
Total overhead (6 x weekly overhead \$1,900)			11,400		
Total cost of operation			19,700		
Gross receipts			12,331		
Loss			7,369		

Percentage of Film Rental  
12,339 / 8300.00 ( 67 + %



[fol. 337] WILLIAM F. RODGERS.

Direct examination:

Q. When you first came into the motion picture business and the licensing of pictures, were there any theatres owned by any of the distributors; and how were pictures generally licensed in those days first run, in a town like Baltimore, let us say?

A. They were always licensed first in the theatre who was in position to pay; and those theatres were always downtown theatres. In those days, even prior to the feature pictures, we did the same thing with short subjects; we sold them at so much per day, as a rule according to the age. There was never any theatre that could pay the price for first run pictures except downtown houses.

Q. So, the showing of single-reels, or two-reels, or features, from 1910 on, when you first came into the business, generally was in the downtown first run theatres?

A. That is right. I don't think we originated that. I think that was the situation in all types of show business. I mean our vaudeville houses. We had so many of them that we always played our stellar acts first in what we called our flagship or State theatre. In the case of Keith's they always played the Palace before they went around to the other theatres in the vicinity.

I think the same thing is true of the legitimate shows, especially in cities which have legitimate houses, such as New York, where you would never think of opening a legitimate show in the Windsor Theatre, in Flatbush; you would certainly play it downtown first run.

Q. And that was true as the shows went on the road, and you played Baltimore?

A. Ever since I have been in the business.

Q. So this run and clearance thing is not something that originated in the motion picture business, but it is a part of the show business, and has been as long as you know?

A. Yes.

[fol. 338] Q. In your opinion is that theatre suited for showing your pictures, Metro pictures, first run exclusive in the City of Baltimore?

A. No, sir.

Q. Will you tell His Honor and the jury why?

A. Well, in the first place, it does not have what we would consider an adequate drawing power, nor would I believe that we would be treating the population in Baltimore fairly if we set our pictures in a theatre for exclusive first run in the neighborhood that would be equally impractical for people in another section to Baltimore to attend, and there are people who like to see pictures when they are very new and are willing to pay for it. But if they do not have the facilities to get there, they are not going to attend, and last, but not least, they could not possibly pay the amount of film rental that would be necessary for us to get for our first run pictures in a city of this population.

(Mr. Rome) They would claim, and are not precluded from arguing to the jury, that they have not done this as the result of any conspiracy; and, if they are a party, this would be conclusive evidence.

(The jury thereupon returned to the courtroom and resumed seats in the jury box.)

(The Court) Members of the Jury, we will now continue this case, and in a few moments the arguments will begin; but counsel for plaintiff has asked to be permitted to introduce, as part of the evidence, decrees in an equity antitrust proceeding brought by the United States against these defendants, and the Court has ruled that under the Clayton Act, the plaintiff has the right to present to you those decrees, or the parts of them that it desires to introduce, because under that Act, in a situation of this kind, the Clayton Act provides that those decrees may be introduced as prima facie evidence.

[fol. 339] I will not at this time give you any further explanation of why these decrees are being introduced, or allowed to be introduced, except to explain to you that they arise as the result of lengthy litigation brought under the Restraint of Trade Statutes by the Government against these various defendants, and that the decrees do require

these defendants to refrain from agreeing with each other, or with any exhibitors or distributors, to maintain a system of clearances, the term "clearances" as used meaning a period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres; and also they were restrained from granting any clearance between theatres not in substantial competition, and also they were restrained from licensing any feature for exhibition upon any run to any theatre in any other manner than that each license shall be offered, and taken theatre-by-theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others.

Now, as I have just explained, these decrees, or parts of them, which the plaintiff wishes to introduce, and is permitted to introduce, are to be taken as prima facie evidence in this case of what has been done and prohibited to have been done by these defendants; but we have here, as the issue before you, which will be fully explained to you in the course of instructions, that you must still, of course, pass upon and find whether there has been any concerted action, any conspiracy, to prevent this plaintiff from having what he is entitled to have by way of proper clearance.

I am just giving you a very broad statement now, in order that you may understand the reason for allowing these decrees to be put in as prima facie evidence in the case. The Court will give you, no doubt, in connection with or as part of its instruction on the law of this case, a further explanation of the weight and effect to be given to these decrees as part of the evidence in the case.

[fol. 340] Now, with that introduction, you may read them.

. . . . .

Now, with that in mind, I give you now the way I think this ought to be presented to the jury.

In order to establish a right to recover, the plaintiff in the present case must show, first, a conspiracy in restraint of interstate commerce and, second, injury to its business caused by such restraint. Of course, I will explain to the jury it is not every restraint, it is only unreasonable restraint.



I am not now going into a lot of questions that are involved, I am just dealing now with the Paramount decree, its position in the case, and the burden of proof.

"The law further provides that if any acts prohibited by the antitrust laws which are alleged to have damaged the plaintiff, have previously been established by decree obtained by the United States Government in either a criminal or civil action, that is, any equity proceeding under these antitrust laws, the plaintiff, in aid of its case, may rely upon such judgment or decree previously obtained by the Government, including the existence of the prohibited acts, and the law provides that such previously obtained judgment or decree is prima facie evidence against the same defendants in a suit of the present nature—that is, of the nature of this present suit before us—brought by the plaintiff against them, that is, prima facie evidence as to all matters that were decided by the previous decree. I instruct you that in the previous equity suits between the government and these same defendants it was decided and covered by the decree in that case that these defendants had conspired together in restraint of trade, in violation of the antitrust laws in restricting these first-runs and in establishing certain clearances in numerous places throughout the United States.

"Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may [fol. 341] use in support of its claim, that what the defendants have done in the present case in Baltimore is within the prohibition of this earlier decree. However, it is only prima facie evidence. There was not before the court in the prior case the present factual situation respecting the Baltimore theatres that we have in the present case."

"I say that, because I understand that it — true. The whole country was before it, and there may have been some evidence, a good deal of evidence about Baltimore, Philadelphia and San Francisco. If there was any about Baltimore, it certainly did not cover this point.

"Therefore, it is still necessary in the present case before the plaintiff can recover, for it to prove to your satisfaction, by the weight of the credible evidence that these defendants or any of them have conspired in an unreasonable

manner to keep first runs from the plaintiff, or also they conspired to restrict plaintiff to clearances which are unreasonable.

"If you find that the plaintiff has sustained its burden of proving conspiracy as just defined, then I instruct you that by virtue of the decree in the previous equity suit which forms part of the evidence in this case, the burden of proving the reasonableness of the failure to give plaintiff first run exclusively or day and date, and also the failure to give it other reasonable clearances, rests not upon the plaintiff but upon the defendant."

Now, after a more thorough, as far as I can judge, a complete study of the controlling cases on this point in the Supreme Court, that is what I understand to be the law. Of course, I might say we all know that, as a practical matter, this technical division of burden between the two parties fades away, because in an ordinary case, take a personal injury case, we have to instruct the jury that A has been injured, that B ran into him, and, of course, the burden is upon A to prove that by the weight of the credible evidence. Of course, A can take advantage of the evidence [fol 342] that defendant has put in, as well as of the evidence he puts in, so there is a practical side to the situation which, perhaps, does not amount to very much after all, when you talk about dividing the burden.

Do counsel want to say anything?

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[fol 343] IN THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

VERSUS

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED,  
RKO Radio Pictures, Inc., Twentieth Century-Fox Film  
Corporation, Universal Film Exchanges, Inc., United  
Artists Corporation, Warner Bros. Pictures, Inc., Warner  
Bros. Pictures Distributing Corporation, Warner Bros.  
Circuit Management Corporation, Columbia Pictures Cor-  
poration, Appellees.

Appeal from the United States District Court for the  
District of Maryland, at Baltimore

September 24, 1952, record on appeal other than the tran-  
script of evidence is filed and the cause docketed.

September 26, 1952, the appearance of R. Dorsey Watkins  
and J. Cookman Boyd, Jr., is entered for the appellees.

MOTION TO ENLARGE TIME—Filed September 29, 1952

(Style of Court and Title Omitted)

The petition of Theatre Enterprises, Inc., respectfully  
shows:

1) That it filed its Notice of Appeal in this case in the  
United States District Court for the District of Maryland  
on June 25, 1952.

2) That on application to the said District Court, and  
with the approval of the defendants, the time for filing the  
transcript of record on appeal, and docketing the appeal,  
was extended by the District Court for a period not exceed-  
ing 50 (fifty) days from August 5, 1952, or to September  
[fol 344] 24, 1952.

3) That the plaintiff-appellant and the defendants-appel-  
lees herein desire to make numerous corrections in the



stenographic transcript of testimony and that it will be impossible to make such corrections by September 24, 1952.

Wherefore it is prayed that this Court by its order extend the time within which Theatre Enterprises, Inc. may file the transcript of record on appeal and docket its appeal herein, from September 24, 1952 to and including October 3, 1952.

And, as in duty bound, etc.

Sol Berenholtz, Attorney for Theatre Enterprises,  
Inc.

No objection: J. Cookman Boyd, Jr., W. R. Dorsey  
Watkins, Attorneys for Defendants.

ORDER ENLARGING TIME TO FILE RECORD AND DOCKET CAUSE—  
Filed September 29, 1952

(Style of Court and Title Omitted).

Upon the Application of the Appellant in the above entitled cause, no objection by the appellees, and for good cause shown,

It Is Ordered that the time within which to file the record on appeal and docket the cause in this Court, be, and it is hereby extended from September 24, 1952, to and including October 3, 1952; but the appeal shall be heard at the November Term of Court notwithstanding this extension of time for filing the record.

September 27, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 345] October 1, 1952, the appearance of Edwin P. Reme and Sol C. Berenholtz is entered for the appellant.

October 9, 1952, stipulation as to the time for the filing of the respective briefs is filed.

October 15, 1952, stipulation as to the time for the filing of the respective briefs is filed.

October 24, 1952, petition of appellant for permission to file brief in excess of 50 printed pages is filed.

**ORDER PERMITTING APPELLANT TO FILE BRIEF IN EXCESS OF  
50 PAGES—Filed October 27, 1952**

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel,  
and for good cause shown,

Special Permission is hereby granted Appellant in the  
above entitled case to file brief in excess of 50 printed pages,  
but not exceeding 62 printed pages.

October 25, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

October 28, 1952, brief and appendix of appellant are  
filed.

November 4, 1952, petition of appellees for permission to  
file brief in excess of 50 printed pages is filed.

**ORDER PERMITTING APPELLEES TO FILE BRIEF IN EXCESS OF 50  
PAGES—Filed November 6, 1952**

(Style of Court and Title Omitted)

Upon the Application of the appellees, by their counsel,  
and for good cause shown,

Special Permission is hereby granted appellees in the  
above entitled case to file brief in excess of 50 pages, but  
not exceeding 65 printed pages.

November 5th, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 346] November 8, 1952, brief and appendix of ap-  
pellees are filed..

November 10, 1952, 3 volumes of the transcript of evi-  
dence are filed.

Same day, the original exhibits are certified up.

# ARGUMENT OF CAUSE

November 21, 1952 (November term, 1952), cause came on to be heard before Parker, Chief Judge, and Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 347] IN THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

VERSUS

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED,  
RKO RADIO PICTURES, INC., et al., Appellees

Appeal from the United States District Court for the  
District of Maryland, at Baltimore. Civil

OPINION—Filed January 5, 1953

Before Parker, Chief Judge, and Soper and Dobie, Circuit  
Judges

Edwin P. Rome (Sol C. Berenholtz, and Gray, Anderson, Schaffer & Rome on brief) for Appellant, and J. Cookman Boyd, Jr., and R. Dorsey Watkins (Edward C. Raftery and E. Compton Timberlake on brief) for Appellees.

[fol. 348] SOPER, Circuit Judge:

This action was brought under the anti-trust laws \* by Theatre Enterprises, Inc., a Maryland corporation, against the eight largest motion picture producing and distributing companies in the United States. The plaintiff sought injunctive relief as well as monetary damages for loss suffered as a result of the defendants' refusal to supply first-run motion pictures to the plaintiff's theater in the City of Baltimore pursuant to an alleged conspiracy during

\* 15 U. S. C. A. §§ 1, 2, 13, 15 and 16.



the period from February, 1949 to March, 1950. The suit was originally instituted in the District Court for the Eastern District of Pennsylvania but on motion of the defendants, under § 1404(a) of the Judicial Code, the case was transferred to the District of Maryland. The case came on for trial before a jury in the latter District and resulted in a verdict for all of the defendants; and the plaintiff appealed contending that the trial judge erred in denying plaintiff's motion for a directed verdict in its favor and in giving certain instructions to the jury.

At the conclusion of all of the evidence the plaintiff prayed the court to instruct the jury that they must return a verdict for the plaintiff in such an amount as they estimated the plaintiff's loss to have been. In other words, the court was asked to instruct the jury that the plaintiff had proved its case against the defendants and that the only question for their decision was the amount of the damages which the plaintiff had suffered. In order to pass on the refusal of this instruction the evidence submitted to the court must be summarized. The task is the easier because the facts presented by Harry D. Myerberg, the president of the plaintiff corporation and its only witness, and by the witness [fol. 349] for the defendants are largely undisputed, and the decision turns on the question whether the only reasonable inference from the facts is that the defendants, in violation of the law, conspired to deny the plaintiff the rights to which it was entitled in the operation of its business.

The testimony on behalf of the plaintiff was to the following effect: For many years, the showing in Baltimore of first-run motion pictures produced by the defendant companies had been confined to eight theaters located in the downtown section of Baltimore as follows: The Century and the Valencia, with seating capacity of 3,000 and 1600-1800 respectively, are both owned by Loew's. They have exhibited all of Loew's product, half of Universal's and some of United Artists'. The Stanley, seating 3,200, is owned by Warner's Circuit Management Corporation and exhibits all of Warner's films and one-half of Paramount's. In the 1920s Warner exhibited first-run exclusively at the Metropolitan, two and a half miles from downtown. Keith's, an independent, has played half of Universal's output, half

of Paramount's, and "whatever else is available." Seating capacity is 2200-2400. The New, seating 1800, is another independent and exhibits Fox films exclusively. The Hippodrome, seating 1800-2000, was also independently owned and exhibited RKO and Columbia films. The Town was opened in 1949 by the owner of the Hippodrome and split RKO and Columbia films with the Hippodrome. The Mayfair, independent, seating 1800, is situated next to the Stanley, but unable to obtain a continuous flow of films from defendant companies, getting "slough" and films of the smaller companies.

The Crest Theatre was built at a cost of \$460,000 by Theatre Enterprises, Inc., a corporation whose entire stock is owned by Myerberg and his brothers. It was completed in February, 1949. It is equipped with the most modern [fol. 350] improvements and with 1600 seats, and is physically suitable to play first-run pictures, and if located downtown, probably would have been acceptable for the preferred showings. It is situated in a shopping center at Reisterstown Road and Rogers Avenue, six miles from the nearest downtown theater, in the midst of a population center estimated at about 105,000 people.

In January, 1948, before construction of the Crest had begun, Myerberg applied for exclusive first-run privileges at the offices of the defendant distributors in Washington, D. C. He was told by all of them that no consideration could be given to his request until the theatre was near completion. When the theatre was under roof in October, 1948, Myerberg renewed his request and was told that the matter had to be decided by the New York home offices of defendants, and that he should set forth his requests by letter, which would then be referred to New York for decision. He wrote substantially identical letters requesting first-run to each defendant, except perhaps Columbia, which was approached subsequently.

Warner and Loew's advised Myerberg that each of them operated a first-run house in Baltimore, and that he should not anticipate receiving their product. The branch managers of all of the companies expressed surprise that Myerberg sought first-run outside the downtown area, contrary to the general practice of the industry. Myerberg engaged in further correspondence with defendants from October,

1948 until the theatre opened on February 26, 1949, and was "stalled" by one company and two others did not reply. He was able to see top officials of only three of defendants, and all of his efforts resulted in rejection of his request for first-run.

During the negotiations plaintiff made specific offers to various defendants for particular first-runs, and in all but [fol. 351] one case the offer included a substantial guarantee of film rental and a percentage of the gross receipts, and plaintiff offered to post certified checks. None of the offers was accepted and in some instances plaintiff received no reply.

Plaintiff persisted in its efforts to induce defendants to grant it first-run after the Crest opened, and when this proved fruitless, plaintiff engaged present counsel who entered into six more months' futile correspondence and then brought this suit.

Plaintiff at first urged that it was not in substantial competition with the downtown theaters, and therefore was willing to take first-run on a day and date basis, that is, simultaneous showing with downtown and other non-competing suburban houses. Defendants contended that the Crest was in substantial competition with the downtown theaters, and plaintiff therefore expressed willingness to bid competitively for exclusive first-runs. Plaintiff denied claiming any superior rights over other comparable neighborhood theaters sufficiently far from downtown Baltimore and from each other as not to be in substantial competition with either downtown or each other, and was willing to play with them first-run day and date. Plaintiff pointed to the Northwood, Boulevard, Senaford and Edmondson Village as theaters entering into such a scheme.

Defendants uniformly denied plaintiff first-run and uniformly granted it first-subsequent-run. They each gave the same basic reasons for their action, principally that each had a policy which limited showing of first-run films throughout the country to theaters in the downtown areas of large cities, and theaters outside those sections were therefore precluded from the preferred run.

Defendants' executives testified that the movie business has developed in such a manner as the result of heavier [fol. 352] downtown traffic and more numerous downtown



attractions to draw greater crowds, particularly for matinees. The defendants were primarily interested in obtaining the largest revenue possible from the exhibition of their pictures, and they said that downtown showings have greater exploitation and advertising value and that the downtown theaters may be properly called "show-case" theaters. In addition downtown theaters have been satisfactory customers of long standing.

Defendants further claimed that if they gave first-run to the Crest, they would lose their downtown customers as well as other subsequent-run customers. They declared that the Crest could not be successful with first-run and that they would not experiment with it. They further stated that the Crest could not be preferred to other similar neighborhood houses and if they should all be granted multiple first-runs the downtown theaters would be eliminated.

The unsuccessful efforts of the plaintiff to secure first-run pictures for its theater and the testimony of the defendants' witnesses indicate clearly in the plaintiff's opinion the existence of a nationwide policy, to which each defendant company adheres, that first-run pictures should be shown only in theaters in downtown sections of cities. Thereby the pictures are exploited and later they are made available to all sections of the city and all classes of people by the reduction of admission prices at later showings.

In six instances set out in the testimony exceptions to this policy have been allowed. Thus in Washington, D. C., and in Wichita, Kansas, an exhibitor which had been giving a first-run privilege to its own theater remote from the center of the city thereafter granted a similar privilege to an independent theater to avoid the charge of discrimination; and in Kansas City, Denver, Boston and Los Angeles exceptions have been made by exhibitors to their own theaters distant [fol. 353] from the center of the city. These exceptions have not been attended by the disastrous result envisaged by those who established the general policy.

Loew's, Warner, Paramount, RKO and Fox, sometimes referred to as the "big five", owned hundreds of theaters in the United States. Many exhibited first-run, almost all of them downtown. All of the defendants exhibited their films in theaters owned by the five theater-owning defendants,

and there was cross-licensing among them. Defendants produce most of the desirable films in the United States.

In addition to the more general "business reasons," Warner opposed the Crest's request because it would destroy Warner's Stanley and all other downtown houses, and would mean the elimination of downtown theaters, of which Warner owned many among its 400 odd houses throughout the country. Loew's likewise opposed the Crest because it would compete with the Century and the resulting spread of neighborhood first-run would curtail revenue from the exhibition of its pictures in downtown first-run houses operated by Fox, Warner, BKO and Paramount in other parts of the country.

Each defendant was aware of the downtown policy of the others and of the theater ownership of the "big five" mostly downtown, and of the system of cross-licensing. Paramount's representative knew that the other companies were going to sell the Crest Theater on a 21 day availability before that house opened. Fox's manager found that no downtown theater in Baltimore was willing to play first-run day and date with the Crest Theatre and decided to do what everyone else was doing. There has been frequent interchange of top sales and distribution personnel among the various defendants.

The effect of the defendants' policy has prevented the [fol. 354] plaintiff from competing in the first-run portion of the movie industry.

In accordance with § 5 of the Clayton Act, 15 U. S. C. A. § 16, the plaintiff, in addition to the testimony above set out, offered in evidence the pertinent portions of certain decrees issued by the court against the same defendants in *United States v. Paramount Pictures*, 334 U. S. 131,\* in order to show that the defendants, prior to the opening of the Crest Theatre, had conspired with one another in restraint of trade in the moving picture industry in violation of the statutes on which the instant suit is based.

The defendants offered 19 witnesses whose testimony may be summarized as follows: It was explained that "run and

\* See also D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881.

clearance" are a well established and essential part of the distribution and exhibition of motion pictures. Indeed Myerberg himself stated during his testimony that "runs and clearances, basically, are all right." Each of the defendant distributors licenses each of its pictures for exclusive first-run in a theater in the downtown shopping area in Baltimore and normally the first-run exhibitor is given a clearance of 21 days over the next succeeding run called the "first-neighborhood-run." No such first-run was shown ever to have occurred in Baltimore. During the three years preceding the institution of the suit, 63 per cent of the first-run exhibitions in Baltimore were held in independent theaters. Myerberg agreed that there was no showing that any of the defendants conspired with the independent downtown exhibitors or with any of the neighborhood exhibitors.

The Crest Theatre is located in the northwest quadrant of Baltimore within a mile of two other neighborhood theaters one of which is comparable to the Crest in all material [fol 355] respects except size; and there are numerous other theaters in the city which are equal or superior to the Crest in appointments and size, many of which are better located than the Crest in respect to public transportation services. Expert testimony placed shopping centers in three classifications, namely, primary centers which have 60 to 150 different stores with one large and several smaller department stores with a drawing power of 50 miles, such as the downtown retail business area in Baltimore; secondly, centers with 20 to 50 stores and at least one department store, of which there are half a dozen in Baltimore, and thirdly, neighborhood shopping centers with not more than 15 stores and no department stores. The Crest Theatre is located in a center of the last mentioned class.

Myerberg conferred with seven of the eight defendants in Washington, D. C., in October, 1948, and about October 12, 1948, sent to all the distributing companies, except Columbia, a letter requesting an outstanding film to open the theatre, preferably a "world premiere."

Myerberg had further conferences with the distributors during October, November and December, 1948. At first he requested exclusive first-run, assuming substantial competition with the downtown houses, and later he requested



simultaneous run on the ground of no substantial competition.

United Artists told him that all its immediate releases were already sold, and did not reply to his letters. Warner said that it had its own theater and therefore would not license first-run to plaintiff. RKO said "no" after Myerberg spoke with a top official in New York. Loew's, like Warner, said that it exhibited in its own theater. Universal rejected the request after its district manager came to Baltimore to examine the Crest, and concluded that the theatre was badly located, even for a neighborhood, and that the [fol. 356] area was already adequately served and over-seated. Fox rejected plaintiff's offer because the location was suitable only for neighborhood operation, and later rejected a request for day and date first-run. Paramount wrote rejecting first-run on the ground that its business interests were best served by continued exhibition of first-run downtown, rather than in suburban areas.

The Crest opened February 26, 1949, and was licensed to play first-neighborhood-run, approximately 21 days after the end of downtown first-run, the same availability given other independent first-neighborhood-run houses.

Plaintiff's attorneys on November 1 or 2, 1949, wrote defendants asking them to experiment with the Crest, first-run, and in an exchange with Fox, asked Fox to experiment first-run day and date. Columbia and United Artists did not reply to these letters. RKO and Paramount did reply, and there is no evidence of replies by Loew's, Warner and Universal.

Prior to bringing this suit, plaintiff made offers for eight pictures to four of defendants. The reasons for their rejection are typified by the following examples. Myerberg asked for an extended first-run of "Samson and Delilah" (Paramount) and offered a guarantee of \$35,000 against 50 per cent of the gross. On direct examination Myerberg said that he anticipated a run of from eight to ten weeks and a gross of over \$80,000. On cross-examination it developed that this would require playing to 20,000 to 30,000 of the 105,000 people in the draw area, and Myerberg reduced his estimate to a five week run, with \$50,000 gross, and failed to produce pencilled notes which he claimed to

have made concerning the matter. Myerberg also asked for an exclusive first-run of "Jolson Sings Again" (Columbia), with a guarantee of \$10,500 against 40 per cent of the gross, [fol. 357] and offered to post a certified check. The film had already been shown in Baltimore first-run two months before.

Testimony of experienced persons in the industry and the testimony of experts was offered in contradiction of Myerberg's testimony in order to show that the downtown theaters in Baltimore draw a substantial number of persons from the outlying districts, such as that in which the Crest is situated. This was illustrated graphically during the transit strike in 1951 when the attendance of the showing of "Quo Vadis" was materially affected although this picture was hailed throughout the country as one of outstanding merit, and except in Baltimore, far outgrossed in its first week the earlier successful picture, "Gone with the Wind." Specific evidence tended to show that the downtown theaters draw 16.34 per cent of their attendance from the area which the Crest claims to serve and that from this area and two other outlying neighborhood areas the downtown theaters draw 37 per cent of their business.

The plaintiff company contends that the evidence above summarized permits of no other conclusion than that the defendants knowingly and deliberately conspired to restrain trade in violation of the statutes and that this conspiracy is shown by the course of conduct which the defendants knowingly, deliberately and uniformly pursued. The burden to prove the conspiracy is upon the plaintiff and there is no direct evidence that the defendants entered into an unlawful agreement; but it is said that such an agreement must necessarily be inferred from the unanimity with which the defendants have adopted the national policy of limiting first-run pictures to downtown theaters under a system of runs and clearances, and that in accord with this policy they have denied first-run pictures but granted the first-subsequent-run of their pictures to the plaintiff.

The plaintiff rests its case to a great extent upon certain [fol. 358] passages in the opinions in cases in the Third Circuit to which most of the defendants in the instant case were parties. In *Wm. Goldman Theatres v. Loew's Inc.*, 3 Cir.,

150 F. 2d 738, the court found that the defendants, who controlled the exhibition of motion pictures in downtown theaters in Philadelphia, had conspired to deny a similar privilege to another completely qualified downtown theater which the plaintiff had opened. In *Ball v. Paramount Pictures*, 3 Cir., 169 F. 2d 317, the court found that the defendant had conspired to take away from a theater first-run pictures upon the termination of the tenant's lease, and had agreed to license the tenant to display these pictures in a new location; and in *Milgram v. Loew's, Inc.*, 3 Cir., 192 F. 2d 578, the court found that the defendants had conspired to deny first-run pictures to a drive-in theater somewhat removed from the center of the nearby city.

Each of these cases was tried without a jury and the circumstances of uniform action consciously taken by a number of persons were thought by the judge to justify an inference that they had engaged in an unlawful conspiracy, and certain expressions in the opinions of the Court of Appeals have led the appellant here to conclude that such an inference from uniform action is not merely permissible but compulsory, once the facts are found. Thus in the *Goldman* case it was said:

"\* \* \* Plaintiff's evidence shows that there is concert of action in what has been done and that this concert could not possibly be sheer coincidence. We think there must have been some form of informal understanding. The axiom is ancient that the deed speaks for itself and that man intends the probable consequences of his act. Here, the conclusion is justified that defendants acted in concert in excluding plaintiff. This conclusion is strengthened by the circumstance that defendants with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. \* \* \* (p. 743)

"\* \* \* Uniform participation by competitors in a particular system of doing business, where each is aware of the other's activities, the effect of which is



restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us." (p. 745)

The last quoted statement is repeated in *Milgram v. Loew's, Inc.*, *supra*, at p. 584.

Notwithstanding these statements, we are not persuaded that it was the intention of the court to hold that it is not necessary to find that the defendants actually conspired if proof of conscious uniform action is adduced. Indeed in the *Milgram* case the court made the following statement:

"\* \* \* This uniformity in policy forms the basis of an inference of joint action. This does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self-interest. This strengthens considerably the inference of conspiracy, for the conduct of the distributors is, in the absence of a valid explanation, inconsistent with decisions independently arrived at" (p. 583).

[Vol. 360] Subsequently in speaking of the *Goldman* case the court said:

"\* \* \* The key question in that case was whether the uniform action of all distributors in not licensing pictures on first run to Goldman was the result of a conspiracy" (p. 585).

See also the decisions in *Westway Theater v. Twentieth Century-Fox Film Corp.*, D. C. Md., 30 F. Supp. 830, 4 Cir., 113 F. 2d 932; *Windsor Theater Co. v. Walbrook Amusement Co.*, D. C. Md., 94 F. Supp. 388, 4 Cir., 189 F. 2d 797.

In the pending case, as we have seen, the defendants offered a substantial body of evidence tending to show a certain independence of action in dealing with Crest and to explain the reasons which led the industry generally to confine the exclusion showing of first-run pictures to down-

town theaters; and it is urged on behalf of the defendants that the decision as to the Crest Theatre by each defendant was based on its experienced judgment as an individual operator, since it was obvious that the grant of first-run privileges to Crest would have led to like grants to neighborhood theaters similarly situated, to the great detriment if not the destruction of the downtown houses generally. Similarly they contend that the adoption by each of them of the same solution of a problem common to the industry indicated the exercise of individual judgment rather than the formation of an unlawful conspiracy.

We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision. In doing so the judge in effect instructed the jury as to the nature of an unlawful conspiracy and told them that the burden of proof was [fol. 361] upon the plaintiff to prove the conspiracy; but that the proof might consist of direct evidence of the fact or circumstantial evidence which gives rise to a logical inference of the existence of the fact; and that in considering the evidence in the case the jury should take into consideration the similarity of business practices of the defendants in general, and with respect to the Crest Theatre in particular. In determining whether there had been a conspiracy; but that if the similarity resulted from nothing more than a common business solution of identical problems in a competitive industry the similarity of conduct would not require a conclusion that the conspiracy actually existed. We find no error in this action of the trial judge.

The plaintiff raises numerous objections to the charge of the court. The District Judge in the opening paragraphs of the charge told the jury that the suit was brought under the anti-trust acts to recover damages suffered by the plaintiff during the period from the opening of its theatre up to March 20, 1950, "the date of the filing of this suit which was originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion for convenience of the parties, such being permitted since the suit might have been brought originally in this court." The plaintiff objects to the quoted passage on the ground that there was

some doubt as to whether the suit could have been originally brought in Maryland against all defendants and because the right of removal was not asserted until December 5, 1950 when the opinion in *Parsons v. United States*, 3 Cr., 195 P. 2d 111, was handed down.

There is nothing in the case, however, to indicate that the change in venue was improper in this particular either in fact or in law. The only possible argument in the plaintiff's connection was the disclosure of the fact that it preferred to try the case in Philadelphia whereas [fol 362] the defendants preferred to try the case in Baltimore. This was brought out by counsel for defendants in their closing argument and counsel for the plaintiff replied that the case was brought in Philadelphia because of the double above mentioned. The plaintiff, however, manifested its reluctance to try the case in Baltimore by resisting the removal even after the right of removal was clearly established so that the jury were in no way misled as to the essential fact.

The plaintiff objects to the instruction that its claim must be judged separately as to each defendant although it was asserting the existence of a national conspiracy which happened to have its impact in Baltimore. There is nothing in the point, since in the same part as well as in other portions of the charge, the judge made it quite clear that the gist of the plaintiff's case was the existence of a combination or conspiracy of the defendants and it was necessary that the jury consider the actions of each defendant separately in order to determine whether it was a member of the combination.

The instruction to the jury on the question of burden of proof is also amended. The language objected to is contained in the following statement of the court:

... \* \* The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants. It is not enough that there has been created in your minds some doubt or



analogous as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would [fol. 363] influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and bear a judgment upon in the disposal of important matters.

It is contended that this language placed the burden of proof beyond a reasonable doubt upon the plaintiff; but obviously this is not so; and moreover, the judge, prior to making the statement, had contrasted the burden of proof in civil cases with that in criminal cases which, as he pointed out, the jury had learned from their experience in previous criminal trials. The jury were expressly told that the burden of proof in a civil case of the kind before the court is not if it is supported by what the jury finds to be the weight of the credible evidence.

It is also contended that the judge should have told the jury in the words of the Third Circuit in the *Goldman* case, 156 F. 2d 732, 745, that uniform participation by competitors in a particular system of doing business, where such is aware of the other's activities, is sufficient to establish an unlawful conspiracy, if the effect is restraint of interstate commerce. This statement standing alone would have been misleading and hazardous, for although conscious similarity or uniformity of action may give rise to a reasonable inference of conspiracy, it does not compel a finding of conspiracy. We think that this was made clear to the jury by the charge of the court. The holding in *Interstate Circuit v. United States*, 306 U. S. 208, 225-226, is not to the contrary. In that case the trial judge had drawn a reasonable inference of conspiracy from the concerted action of the defendants, and the defendants had failed to tender any evidence as to whether an agreement had in fact been reached, and the Supreme Court said that since the proof supported the inference of concerted action the burden [fol. 364] rested on the defendants of going forward with the evidence to explain or contradict it. In the pending case the defendants did go forward with explanatory proof.

During the trial, the plaintiff in order to establish its charge of conspiracy against the defendants, offered in evidence the decrees issued against the same defendants by the court in *United States v. Paramount Pictures*, 324 U. S. 131, D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 381. In that case it was found that the same defendants, prior to the existence of the Crest Theatre, had conspired to restrain trade in violation of the anti-trust acts by agreeing illegally to fix prices and to impose unreasonable clearances and in other ways, and decrees of injunction were accordingly issued against them.

The evidence was admitted in the instant case under the provisions of § 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides that a final judgment rendered in a criminal prosecution or in a suit in equity brought by the United States under the anti-trust laws to the effect that a defendant has violated those laws, shall be prima facie evidence against the defendant in any suit brought against him by any other party under the said laws as to all matters respecting which the former judgment would be an estoppel as between the parties thereto.

The statute was applied in *Emack v. General Motors*, 340 U. S. 558, where the plaintiff sued to recover damages against certain defendants who had conspired to restrain trade in violation of the anti-trust acts, and it was held that the plaintiff was entitled to put in evidence the decree in a prior injunction suit brought by the government in which it was shown that the same defendants had entered into such a conspiracy and had effectuated it by illegally coercing the plaintiff and other persons. The decree was held to be prima facie evidence both of the conspiracy and [fol. 365] of the effectuating acts. It was also held that the judge was free to exercise his discretion in explaining to the jury the issues decided in the prior case bearing upon the case on trial before him.

The Paramount decrees had no relation to the Crest Theatre since it was built after they were rendered, but they were offered to show that the defendants had entered into a prior conspiracy which was given effect when the plaintiff applied for first-run privileges. The judge resolved his doubts as

to admissibility in favor of the plaintiff, and gave the following instructions to the jury:

\*\*\* \* \* I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Great Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired [fol. 366] to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants."

We find nothing detrimental to the plaintiff in these instructions. The court correctly instructed the jury that the decrees were only prima facie evidence and not conclusive



evidence of the conspiracy on which the plaintiff's case is based. This is in accordance with the terms of the statute and with the holding in *Fifth & Walnut, Inc. v. Loew's, Inc.*, 2 Cir., 176 F. 2d 537, 590, where it was held that the decision in the *Paramount* case was not conclusive of the question of conspiracy among the defendants in a private damage action involving a single city. See also *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 2 Cir., 130 F. 2d 951, 957-8.

There were other objections to the Judge's charge, all of which have been considered, but we find no error, and nothing worthy of additional comment. The judgment is therefore

**Affirmed.**

[fol. 367] IN THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6512

**THEATRE ENTERPRISES, INC., Appellant,**

vs.

**PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED,  
RKO Radio Pictures, Inc., Twentieth Century-Fox Film  
Corporation, Universal Film Exchanges, Inc., United  
Artists Corporation, Warner Bros. Pictures, Inc., Warner  
Bros. Pictures Distributing Corporation, Warner Bros.  
Circuit Management Corporation, Columbia Pictures Cor-  
poration, Appellees**

Appeal from the United States District Court for the  
District of Maryland

JUDGMENT—Filed January 5, 1953

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

strict Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 5, 1953.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, U. S. Circuit Judge; Armisted M. Dobie, U. S. Circuit Judge.

January 27, 1953, petition of appellant for a stay of mandate is filed.

[fol. 368] IN THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

ORDER STAYING MANDATE—Filed January 29, 1953

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 28, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

February 26, 1953, motion for further stay of mandate is filed.

ORDER FURTHER STAYING MANDATE—Filed February 26, 1953

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, further stayed

pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a Writ of Certiorari is filed in the said Supreme Court by March 9, 1953.  
February 25, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 369] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1952

[Title omitted]

STIPULATION—February 24, 1953

It Is Stipulated and Agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for writ of certiorari the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.
2. Appendix to brief of appellees in the United States Court of Appeals for the Fourth Circuit, and its Opinion.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.
4. This stipulation.

It Is Further Stipulated and Agreed that the petitioner will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to certify and file with the Clerk of the Supreme Court of the United States the complete record on appeal; and that, in the event the petition for writ of [fol. 370] certiorari is granted, the printed record shall consist of the printed record on the petition for writ of certiorari and such additional portions of the certified record as the parties may designate.

It Is Further Stipulated and Agreed that the parties hereto may refer in the petition for writ of certiorari and



briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Gray, Anderson, Schaffer & Rome, by Edwin P. Rome, Sol C. Berenholtz, Counsel for Petitioner; R. Dorsey Watkins, J. Cookman Boyd, Jr., Counsel for Respondents.

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[fol. 371] Clerk's Certificate to foregoing transcript omitted in printing.

(6940)

[fol. 366] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1952

No. 649

THEATRE ENTERPRISES, Inc., Petitioner,

vs.

PARAMOUNT FILM DISTRIBUTING CORP., et al.

ORDER ALLOWING CERTIORARI—Filed May 25, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9185)